①

Supreme Court, U.S.
FILED

01 816 NOV 0 1 2001

OFFICE OF THE CLERK

No. 00-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

JOE HARRY PEGG,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MICHAEL S. PASANO
Zuckerman, Spaeder,
Taylor & Evans
Suite 900
201 S. Biscayne Boulevard
Miami, FL 33131
(305) 579-0110

WILLIAM J. GENEGO*
Nasatir, Hirsch, Podberesky
& Genego
2115 Main Street
Santa Monica, CA 90405
(310) 399-3259

Counsel for Petitioner
JOE HARRY PEGG

* Counsel of Record

38pp

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding petitioner was required to prove his lawyer's actual conflict adversely affected his performance in order to establish a Sixth Amendment violation, where the conflict was based on the lawyer having engaged in criminal conduct related to the charges against his client?

2. Did the Court of Appeals err in holding petitioner was required to prove his lawyer advised him to plead guilty because it was consistent with the lawyer's personal interest, and for no other reason, in order to establish the lawyer's actual conflict adversely affected his performance under *Cuyler v. Sullivan*, where the lawyer admitted his advice to petitioner was affected by his own personal interest?

3. Did the Court of Appeals err in holding petitioner was required to satisfy the "adverse effect" test for multiple representation conflicts established by *Cuyler v. Sullivan*, in order to establish his lawyer's self-interest conflict violated the Sixth Amendment?

PARTIES TO THE PROCEEDINGS

Petitioner Joe Harry Pegg was the petitioner in the district court and appellant in the Court of Appeals for the Eleventh Circuit. Before the district court, the respondent was the United States of America. The Court of appeals for the Eleventh Circuit identified the appellee as being the United States of America, and it is the only respondent in this Court.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

Table of Authorities vii

ORDERS OF THE DISTRICT AND CIRCUIT COURT 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 2

Preliminary Statement 2

STATEMENT OF THE CASE 5

- A. Proceedings In The District Court ... 5
- B. Post-Conviction Proceedings 8
- C. Proceedings In The Court of Appeals 10

REASONS FOR GRANTING THE WRIT 12

I. The Court of Appeals Erred In Holding The Attorney-Client Crime Conflict Between Petitioner And His Counsel Was Not Subject To The *Per Se* Prejudice Rule For Sixth Amendment Violations 12

A. Certain types of impairments on the right to counsel are subject to a *per se* prejudice rule 12

B. Attorney-client crime conflicts should be subject to a *per se* prejudice rule 13

C. *Fulton* applies to the attorney-client crime conflict in this case 15

II. The Court of Appeals Erred In Ruling That Because Petitioner's Lawyer Identified Reasons Other Than His Self-Interest To Advise Petitioner To Plead Guilty, Petitioner Had Failed To Establish His Lawyer's Conflict Adversely Affected His Performance 18

A. An "actual conflict adversely affects" counsel's performance if it "impairs" the defense, "influences" counsel's strategic decisions, or prevents counsel from pursuing a client's interest "single-mindedly." 18

B. According to the Court of Appeals, an actual conflict adversely affects counsel's performance only if the conflict can be proved to have caused counsel to forego an alternative strategy 21

1. The "link" test for determining adverse effect, as applied by the Court of Appeals, is inconsistent with *Sullivan* and excludes meritorious claims 21

2. The "likely affected" standard for adverse effect is consistent with *Sullivan* and limits relief to meritorious claims 24

3. Lawyer self-interest conflicts present special problems in determining adverse effect......... 25

CONCLUSION 28

TABLE OF AUTHORITIES

Austin v. Erickson,
477 F.2d 620 (8th Cir. 1972 21

Brien v. United States,
695 F.2d 10 (1st Cir. 1982) 22

Cuyler v. Sullivan,
446 U.S 335. .... 19, 20, 23, 25

Foxworth v. Wainwright,
516 F.2d 1072 (5th Cir. 1975 21

Freund v. Butterworth,
165 F.3d 839 (11th Cir. 1999) 21, 22,
25, 26

Glasser v. United States,
315 U.S. 60 (1942) 19

Government of Virgin Islands v. Zepp,
748 F.2d 125 (3rd Cir. 1984) 14

Lopez v. Scully,
58 F.3d 38 (2nd Cir. 1995) 22

Mickens v. Taylor,
240 F.3d 348 (4th Cir.), *certiorari granted*, 121 S. Ct. 1651 (2001) 22

Stoia v. United States,
22 F.3d 766 (7th Cir. 1994) 24, 25, 26

Strickland v. Washington,
466 U.S. 668 (1984) 12, 13, 14,
15, 18, 20

United States v. Cancilla,
725 F.2d 867 (2nd Cir. 1984) 13

United States v. Fahey,
769 f.2d 829 (1st Cir. 1985) 22

United States v. Fulton
5F.3d 605 (2nd Cir. 1993) ... 13, 14, 15, 16, 17

United States v. Gambino,
864 F.2d 1064 (3rd Cir. 1988) 22, 26

United States v. Grieg,
967 F.2d 1018 (5th Cir. 1992) 14

United States v. Levy,
25 F.2d 146 (2nd Cir. 1994) 22

United States v. Mett,
65 F.3d 1531 (9th Cir. 1995) 24

United States v. Ross,
33 F.3d 1507 (11th Cir. 1994) 14

United States v. White,
706 F.2d 506 (5th Cir. 1983) 14

Wood v. Georgia,
450 U.S. 261 . . . . 20, 23, 25

STATUTES AND RULES

28 United States Code

§ 1254(1) 1
§ 2255 . . . . 1, 9

ORDERS OF THE DISTRICT AND CIRCUIT COURT

The November 3, 2001 order of the Court of Appeals for the Eleventh Circuit denying petitioner's petition for rehearing is unreported. A copy is reproduced as Appendix A. The June 12, 2001 opinion of the Court of Appeals affirming the district court's denial of petitioner's motion pursuant to 28 U.S.C. section 2255 to vacate his conviction is reported at 253 F.3d 1274. A copy is reproduced as Appendix B. The district court's opinion and order denying petitioner's section 2255 motion is reported at 49 F. Supp.2d 1322. A copy is reproduced as Appendix C.

JURISDICTION

Petitioner invoked the jurisdiction of the district court by filing a motion pursuant to 28 U.S.C. section 2255. Petitioner filed a timely notice of appeal and invoked the jurisdiction of the Court of Appeals pursuant to 28 U.S.C. sections 1291 & 2253. On August 3, 2001, the Court of Appeals denied petitioner's timely filed petition for rehearing and the Court declined petitioner's suggestion of en banc review.

The jurisdiction of this Court to review the orders of the Eleventh Circuit is invoked under 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI, U.S. Constitution

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

Preliminary Statement

James Sharp, the lawyer who advised Joe Pegg to plead guilty, had a personal stake in the outcome. If Pegg continued on his intended path of proceeding to trial, Sharp would be disqualified, and the motion the government would file to have him disqualified would disclose publicly that Sharp had worked with Pegg in an attempt to obstruct justice and suborn perjury to gain Pegg's acquittal. Further, if Pegg proceeded to trial, the government would present evidence of Sharp's alleged crimes. That evidence would become a part of the public record for ever after, insuring the personal and professional fallout for Sharp would not end with the trial.

The government communicated to Sharp that alternatively, if Pegg changed his mind and plead guilty, Sharp would be allowed to continue to represent Pegg. The government would not seek his disqualification, and there would be no public disclosure or public record of the allegations against Sharp or the evidence that supported them.

Two weeks after firmly announcing his client would accept no plea offers, Sharp stood before the judge on the morning of trial and asked for a ten day continuance, representing he was confident a plea disposition could be reached. The court instead gave Sharp twenty-four hours. That began what Sharp described as the most frantic, emotionally charged period of his professional career. Pegg expressed surprise, anger and disappointment, alternately insisting upon trial and asking Sharp to tell him what he should do. It ended with Pegg entering a plea pursuant to an agreement that had literally been constructed from scratch, and which resulted in Pegg being sentenced to thirty years imprisonment.

The District Court and Court of Appeals acknowledged Sharp's representation of Pegg occurred under the cloud of an actual conflict, which Pegg had never waived. Both courts also agreed that the alternative to pleading guilty - trial - was a viable and reasonable alternative under the facts.

Sharp admitted at the post-conviction evidentiary hearing that he considered his own-self interest in advising Pegg. Sharp, however, maintained he had put his own interests second to Pegg's, and identified factors other than his personal interest that he thought weighed in favor of Pegg not proceeding to trial. Based on Sharp's testimony that his personal interest was not the reason he advised Pegg to plead guilty, the Court of Appeals ruled Pegg had failed to establish a violation of his Sixth Amendment right to conflict-free counsel.

The "adverse effect" test applied by the Court of Appeals conflicts with the adverse effect test of at least three other circuits, all of which would have entitled Pegg to relief. In fact, in the Second Circuit, the attorney-client crime conflict between Sharp and Pegg would have been deemed *per se* prejudicial, making it unnecessary to prove adverse effect.

The adverse effect test applied by the Court of Appeals was adopted for mutual representation conflicts, not lawyer self-interest conflicts. Under the adverse effect test applied by the Court of Appeals, no petitioner could demonstrate adverse effect from a lawyer's self-interest conflict. That means either the Court of Appeals applied the test incorrectly, or a different test has to be established for lawyer self-interest conflicts.

STATEMENT OF THE CASE

A. Proceedings In The District Court

On March 29, 1994, petitioner and other defendants were charged in a two count indictment returned in the Middle District of Florida with conspiring to import marijuana in November, 1988 and April, 1989. App C 18. Petitioner was represented by James E. Sharp, a Washington, D.C. lawyer. App C 18. Sharp selected Tampa attorney John Fitzgibbons to be local counsel. It was understood Fitzgibbons was not being retained to assist Sharp in the development or preparation of the defense, or to actually participate in the trial. App C 19.

Approximately two weeks before the November 28 trial date, Sharp notified the government that petitioner would not accept a plea offer and would proceed to trial. A few days later, on November 18, 1994, Collazo "faxed" Sharp a "proposed" motion to disqualify him (and his partners) from representing petitioner at trial. App C 120-21. The motion was not filed with the court. App C 23.

The government's proposed motion revealed it had evidence that "Sharp was involved in unethical and criminal conduct related to the charges for which petitioner was to stand trial." App C 21. Specifically, the motion detailed that cooperating witness Reggie Baxter would testify to Sharp's participation and role "in concocting" a version of events for Baxter to tell DEA agents as part of his supposed cooperation. App C 21-22. The government maintained this evidence created a conflict for Sharp that petitioner could not waive.

The government's proposed request for Sharp's disqualification, however, was conditioned upon petitioner proceeding to trial. If petitioner went to trial, the government would move to have Sharp disqualified; if petitioner instead plead guilty, the government would not seek Sharp's disqualification. App C 22. The government's proposed motion became Sharp's primary focus and concern, to the exclusion of preparing for trial. App C 24.

On the morning petitioner's trial was to commence, co-defendant Bernard Gechtman entered a plea of guilty. The factual basis for Gechtman's plea included a statement that implicated petitioner in one of the alleged importations. Gechtman, however, did not enter into a plea agreement with the government, and instead plead "straight up." App C 25.

When petitioner's case was called for trial, Sharp told the court he believed a plea disposition could be reached and requested a ten day continuance. The court gave him 24 hours. App C 26.

Sharp, and his partners Lankford and Knight, met with petitioner the evening of November 28. Petitioner, who expected to go to trial, was described as "very upset," "troubled," "frantic," about the sudden change of events. He continued to express a desire to go trial. App C 27. Sharp admitted he considered the consequences to himself personally in counseling petitioner. He maintained, however, that he placed petitioner's interests first. App C 26.

Petitioner plead guilty the following morning under an agreement which required him to plead to one count, cooperate with the government and provide complete and truthful cooperation and forfeit $4 million by June 1, 1995. In return, the government would dismiss the other count, not file second offender papers and conditionally recommend acceptance of responsibility, and the government had the right to seek an upward adjustment based on petitioner's role in the offense. If petitioner was able to provide cooperation the government considered "substantial assistance," it might recommend a downward departure. App C 26-27.

DEA Agent Sam Murad believed Sharp had engaged in criminal conduct. However, after petitioner's guilty plea, Murad reasoned "[t]here was nothing further to pursue," and did not plan further investigation. Doc 405 Pg 63 (Murad)

In the following months, petitioner attempted but failed to comply with the forfeiture condition of his plea agreement. As a consequence, the government cut-off his debriefing and filed a motion to have him sentenced.

Sharp did not appear at petitioner's sentencing, even though he was still counsel of record. When petitioner was brought to court, his first time in court since pleading guilty, he moved to withdraw the plea. The court denied the motion. App C 33.

Local counsel Fitzgibbons appeared with petitioner at sentencing and orally requested a continuance to allow petitioner further time to accomplish the required forfeitures. In explaining why the terms of the plea had not yet been accomplished, Fitzgibbons told the court that petitioner had been "placed in an untenable situation before he plead guilty because of the accusations against his attorneys." App C 32-33. The court denied the continuance and sentenced petitioner to 360 months imprisonment. App B 4.

B. Post-Conviction Proceedings

In early February, 1997, Florida attorney William F. Jung sent Sharp & Lankford a draft section 2255 motion Jung had prepared for petitioner. The draft motion quoted and reiterated Baxter's accusations against Sharp from the government's proposed disqualification motion. Promptly upon receiving the draft, Sharp & Lankford sent a letter to Jung telling him that if the memorandum were filed, the firm would "consider all privileges waived," and "shall sue civilly, seek Rule 11 sanctions, and initiate bar disciplinary proceedings against those who are a party to it." Pet's Exh 11.

On February 18, 1997, with the assistance of new counsel, petitioner filed a motion pursuant to 28 U.S.C. section 2255 to vacate his conviction and sentence. The grounds stated for relief included the denial of petitioner's Sixth Amendment right to effective assistance of counsel due to his attorney's actual conflict.[1] After the government filed an opposition to the motion and petitioner filed a reply, an evidentiary hearing was conducted. App B 4.

The district court ruled Sharp had an actual conflict which petitioner had not waived. App C 38-39. The court also acknowledged that where a defendant is represented by counsel who is alleged to have participated "in criminal conduct related to the crimes against the defendant," the resulting actual conflict entitles the defendant to relief without the need to show the conflict adversely affected counsel's performance. The court, however, said the rule was inapplicable here because it accepted as true Sharp's unrebutted testimony at the evidentiary denying that Baxter's allegations were false. App C 40. The court also ruled that petitioner had not demonstrated the conflict "adversely affected" counsel's performance. The court agreed that trial was a reasonable and viable alternative strategy for petitioner to pursue, but ruled the record did not establish the alternative of trial was not undertaken "due to" the conflict, or that it was inherently in conflict with Sharp's loyalties or interests. App C 41.

---

[1] The motion sought relief on two additional grounds, denial of presentence motion to withdraw guilty plea, and government breach of plea agreement, neither which were pursued beyond the district court.

C. Proceedings In The Court of Appeals

In a published opinion, the Court of Appeals affirmed the district court. App B. The Court held that to be entitled to relief, petitioner was required to prove his counsel's actual conflict adversely affected his performance. To prove adverse effect, petitioner had to establish (1) there was a plausible alternative defense strategy that might have been pursued, (2) which was reasonable under the facts, and (3) a link between the actual conflict and the decision to forgo the alternative strategy. To establish the "link," petitioner had to prove the alternative strategy was not undertaken "due to" the conflict or that it was inherently in conflict with the conflicting interest. App B 10.

The Court of Appeals ruled petitioner had failed to establish the required "link," and relied on three facts.

First, "the plan under which [petitioner] was to plead guilty was devised by Fitzgibbons, an attorney who did not act under any conflict." App B 11. Second, all of petitioner's lawyers concurred in the recommendation. App B 11. Third, if petitioner had not plead guilty, "Getchman, a co-conspirator turned government witness, would have testified against [petitioner] at trial and his testimony would have been devastating to [petitioner's] case." App B 12.

The record demonstrates all three facts are clearly erroneous. First, Fitzgibbons specifically testified the plan for petitioner to plead guilty was ***not*** devised by him but by Sharp. Doc 405 Pg 40-41 (Fitzgibbons) Second, Knight, one of petitioner's lawyers, testified he believed the plea was not in petitioner's best interest, because its terms could not be fulfilled and Knight communicated his view to Sharp. Doc 397 Pg 182-183, 233-34 (Knight). Third, Getchman had not "turned government witness." As the district court noted, Getchman did not even have a plea agreement. App C 25.

The Court of Appeals also held that the *per se* reversal rule of the Second Circuit which petitioner urged the Court to adopt did not apply to his case, for the same reason given by the district court. App B 13-14.

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals Erred In Holding The Attorney-Client Crime Conflict Between Petitioner And His Counsel Was Not Subject To The *Per Se* Prejudice Rule For Sixth Amendment Violations

A. Certain types of impairments on the right to counsel are subject to a *per se* prejudice rule.

Infringement on a defendant's right to counsel ordinarily must be proved to be prejudicial for the infringement to constitute a constitutional violation. *Strickland v. Washington*, 466 U.S. 668, 692 (1984) In certain instances, however, prejudice is presumed due to the nature of the infringement. The "[a]ctual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice," as are "various kinds of state interference with counsel's assistance." *Strickland*, 466 U.S. at 692 (citation omitted)

A distinguishing feature common to this category of infringements is that "[p]rejudice . . . is so likely that a case-by-case inquiry into prejudice is not worth the cost." *Strickland*, 466 U.S. at 692. Additionally, they "involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent." *Id.*

B. Attorney-client crime conflicts should be subject to a *per se* prejudice rule.

Actual conflicts generally are subject to a limited presumption of prejudice. *Strickland*, 466 U.S. at 692. One specific type of actual conflict, however, has been held to be subject to the *per se* rule of prejudice - - "[w]hen a government witness alleges that the defendant's counsel engaged in criminal conduct related to the charges for which the defendant is not trial," the resulting actual conflict is subject to the *per se* prejudice rule, unless "the attorney is demonstrably innocent and the government witness's allegations are plainly false." *United States v. Fulton*, 5 F.3d 605, 610 (2d Cir. 1993); *United States v. Cancilla*, 725 F.2d 867, 870 (2d Cir. 1984).

This type of conflict is "of a different character than other conflicts," as it "involves a bias arising out of counsel's powerful self-interest in avoiding criminal charges or reputational damage . . ." *Fulton*, 5 F.3d at 613. Not only is the corrupting influence of the conflict stronger, but its scope is much broader:

> Where a government witness implicates defense counsel in a related crime, the resulting conflict so permeates the defense that no

> meaningful waiver can be obtained. In such a case, we must assume that counsel's fear of, and desire to avoid, criminal charges, or even the reputational damage from an unfounded but ostensibly plausible accusation, will affect virtually every aspect of his or her representation of the defendant.

Fulton, 5 F.3d at 613 (emphasis added).

Application of the *per se* rule of prejudice to this attorney-client crime conflicts is also appropriate because they exhibit the characteristics that make application of the *per se* rule appropriate to other types of impairments.

First, "[p]rejudice . . . is so likely that case-by-case inquiry into prejudice is not worth the cost." *Strickland*, 466 U.S. at 692 (citation omitted). As case law confirms, given the scope of the conflict and the powerful influence of self-preservation, prejudice is virtually inevitable. *See United States v. Ross*, 33 F.3d 1507, 1524, n.29 (11th Cir. 1994); *United States v. Greig*, 967 F.2d 1018, 1022-23 (5th Cir. 1992); *Govt. of Virgin Islands v. Zepp*, 748 F.2d 125, 136 (3rd Cir. 1984); *United States v. White*, 706 F.2d 506 (5th Cir. 1983).

Most, if not all of these cases, never would have arisen with a *per se* prejudice rule. For example, a *per se* rule would have prevented this case, because it would have required Sharp's disqualification regardless of whether petitioner went to trial or plead guilty. The existence of this case, and others like it, thus illustrate the high cost of a case-by-case determination of prejudice.

Second, as evidenced by this case, the "prosecution is directly responsible" for the impairment, and it is an impairment that is "easy for the government to prevent." *Strickland*, 466 U.S. at 692 (citation omitted). The prosecution was responsible for the conflict in the sense that it intended to call Baxter to testify to Sharp's criminal conduct, knowing the conflict it would create. The government could have easily prevented it, by moving to disqualify Sharp without conditioning it on whether petitioner plead guilty.

Further, the *per se* prejudice rule is appropriate because attorney-client crime conflicts are sufficiently disabling as to render them equivalent to the constructive denial of the right to counsel. *Fulton*, 5 F.3d at 611, *citing*, *Strickland*, 466 U.S. at 692.

C. *Fulton* applies to the attorney-client crime conflict in this case.

The District Court accepted *Fulton's* holding that attorney-client crime conflicts are subject to a *per se* prejudice rule, and the Court of Appeals accepted that the *per se* rule might be applicable to such conflicts. App C 40;

App B 14. Both courts, however, believed petitioner's case was not subject to *Fulton* based on the district court's determination to "accept Sharp's uncontroverted testimony [at the post-conviction evidentiary hearing] that Baxter's allegations were false." App B 1279.

The Court of Appeals believed this determination by the district court made *Fulton* inapplicable, because *Fulton* says that where it is determined the allegations against the lawyer are false, a waiver is possible. App B 1279, *citing*, *Fulton*, 5 F.3d at 613. The Court mistakenly equated the pretrial determination that *Fulton* requires for a meaningful waiver, with the post-conviction determination the district court made in this case.

Fulton provides that a "if a district court holds a full hearing and can definitively rule out the possibility that the allegations are true, a meaningful waiver is possible . . ." *Fulton*, 5 F.3d at 613. As *Fulton* explains, a waiver is possible in that circumstance because the district court's determination changes the nature of the conflict by assuring the lawyer he no longer needs to be concerned with defending himself against criminal liability. The all pervasive conflict that exists when a lawyer is concerned with defending himself, and which *Fulton* says cannot be waived by the defendant under any circumstances, becomes a narrowly confined conflict, as "the falsely accused attorney is conflicted only to the extent she cannot cross-examine the witness regarding the false allegations." *Fulton*, 5 F.3d at 613.

A post-conviction determination that the allegations are false cannot be equated with a determination made pretrial, because the post-conviction determination does not and cannot change the nature of the conflict *post hoc*. The nature of Sharp's actual conflict at the time he was representing petitioner made the *per se* rule of *Fulton* applicable. The district court's determination five years later to accept Sharp's testimony that the allegations were false, does not change the nature of the conflict as it existed at the time of the representation in 1994, nor does it affect the applicability of the *per se* prejudice rule to the conflict.

The Court of Appeals also mistakenly read *Fulton* to apply only at trial. App B 13-14. ("the accusation in *Fulton* that counsel was involved in the alleged crime would seem to affect counsel's handling of the trial.") The Court offered no explanation why the allegations would affect counsel's "handling of the trial," but not affect the decision whether to go to trial at all. In any event, the Court of Appeals misread *Fulton*, as the court there explicitly recognized the allegations affect counsel's ability to advise the defendant about whether to plead guilty or go to trial. *Fulton*, 5 F.3d at 610 ("the attorney is not in a position to give unbiased advice to the client about such matters as ***whether or not to*** testify or to ***plead guilty*** and cooperate since such testimony or cooperation from the defendant may unearth evidence against the attorney.")

Contrary to the ruing of the Court of Appeals, *Fulton* applies to the attorney-client crime conflict in this case, and the Second Circuit's *per se* prejudice rule for such conflicts as reflected by *Fulton*, should be adopted.

II.

The Court of Appeals Erred In Ruling That Because Petitioner's Lawyer Identified Reasons Other Than His Self-Interest To Advise Petitioner To Plead Guilty, Petitioner Had Failed To Establish His Lawyer's Conflict Adversely Affected His Performance

A. An "actual conflict adversely affects" counsel's performance if it "impairs" the defense, "influences" counsel's strategic decisions, or prevents counsel from pursuing a client's interest "single-mindedly."

To establish a violation of the Sixth Amendment right to counsel based on a conflict of interest, "a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Strickland v. Washington*, 466 U.S. at 692, *quoting*, *Sullivan*, 446 U.S. at 348. The Court first articulated this standard in stating the holding of

Sullivan: "We hold that the possibility of a conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict adversely affected his lawyer's performance." *Id.*, 446 U.S. at 350 (emphasis added).

Sullivan used *Glasser v. United States*, 315 U.S. 60 (1942), as an example of where an actual conflict adversely affected counsel's performance. In *Glasser*, two defendants, Glasser and Kretske, were initially represented by separate counsel. During trial, Kretske dismissed his lawyer. The trial judge then appointed Glasser's lawyer Stewart to represent Kretske also. After becoming counsel for both Glasser and Kretske, Stewart failed to cross-examine a government witness who tied Glasser to the conspiracy and failed to object to the admission of arguably inadmissible evidence. The Court viewed those failures to be the result of Stewart's desire to protect Kretske's interests by diminishing the jury's perception of his guilt and was thus "indicative of Stewart's struggle to serve two masters. . . ." *Glasser*, 315 U.S. at 75. The Court in *Sullivan* explained that "[s]ince this actual conflict impaired Glasser's defense, the Court reversed his convictions." *Sullivan*, 446 U.S. at 349 (emphasis added).

The Court in *Sullivan* made explicit that the adverse effect standard did not require a showing of prejudice, that is, a showing the conflict affected the outcome of the proceeding. *Sullivan*, 446 U.S. at 349, *citing*, *Glasser*, 315 U.S. at 76. Rather, as *Strickland*, later explained, the showing of adverse effect required by *Sullivan* provides a basis for presuming the conflict was prejudicial. *Id.*, 466 U.S. at 692.

Wood v. Georgia, which followed *Sullivan*, provided further guidance as to the meaning of "adverse effect." In *Wood*, an owner of an adult book store had paid for a lawyer to defend employees of his store who were charged with crimes committed in connection with their employment. The employer continued to pay the lawyer to represent the employees at a probation revocation hearing arising out of their failure to pay the fines imposed upon their convictions. On these facts, the Court expressed its concern that the lawyer "may not have pursued their interests single-mindedly." *Id.*, 450 U.S. at 271-272 (emphasis added).

The Court ordered a remand to the state court to determine if the defendants right to counsel was violated by an actual conflict. The question that needed to be answered to make that determination, as stated by the Court, was "whether counsel was influenced in his basic strategic decisions by the interests of the employer who hired him." *Id.*, 450 U.S. at 272 (emphasis added).

B. According to the Court of Appeals, an actual conflict adversely affects counsel's performance only if the conflict can be proved to have caused counsel to forego an alternative strategy.

1. The "link" test for determining adverse effect, as applied by the Court of Appeals, is inconsistent with *Sullivan* and excludes meritorious claims.

To demonstrate Sharp's actual conflict "adversely affected" his performance, the Court of Appeals required petitioner to show: "(1) the existence of a plausible alternative defense strategy or tactic that might have been pursued; (2) that the alternative strategy or tactic was reasonable under the facts; and (3) a link between the actual conflict and the decision to forgo the alternative strategy of defense." App B 10, *citing, Freund v. Butterworth*, 165 F.3d 839, 860 (11th Cir. 1999) (*en banc*). To "link" that petitioner was required to establish was that the alternative strategy "was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." App B 10, *citing, Freund*, 165 F.3d at 860.

The origin of this link test for "adverse effect" actually precedes *Sullivan*, and was originally articulated as a formulation for determining an actual conflict. *Foxworth v. Wainwright*, 516 F.2d 1072, 1079 (5th Cir. 1975); *Austin v.*

Erickson, 477 F.2d 620, 624 (8th Cir. 1972). Its first post-*Sullivan* use appears to be *Brien v. United States*, 695 F.2d 10, 15 (1st Cir. 1982), where is was still used to define an "actual conflict of interest." It was used again by the First Circuit to define an actual conflict in *United States v. Fahey*, 769 F.2d 829, 836 (1st Cir. 1985). The Third Circuit adopted the formulation of *Fahey* in 1988, and in doing so, described it as a test that "includes both the actual conflict and adverse effects prongs of the conflict of interest analysis." *United States v. Gambino*, 864 F.2d 1064, 1070-1071 (3d Cir. 1988). The link test has since been adopted by other circuits, including the Second, Fourth and Eleventh Circuits. *Mickens v. Taylor*, 240 F.3d 348 (4th Cir.)(*en banc*), *certiorari granted*, 121 S. Ct. 1651 (2001); *Freund*, 165 F.3d at 860. *United States v. Levy*, 25 F.2d 146 (2d Cir. 1994)

The "link" element of the formulation requires a petitioner to show the alternative strategy was not pursued "because" of the conflict. *See, e.g., Lopez v. Scully*, 58 F.3d 38, 42 (2d Cir. 1995). In other words, it requires a showing that "but for" the conflict, the alternative strategy would have been pursued. *See Freund*, 165 F.3d at 866 (rejecting argument that "but for" conflict, counsel would have pursued alternative strategy).

Under this approach, as this case illustrates, the required link cannot be established as long as a plausible reason, other than the conflict, can be identified for not pursuing the alternative strategy. As a result, the link test limits adverse effect to those circumstances where no plausible reason exists, other than the conflicting interest, for the lawyer not to pursue the alternative strategy. Thus, even if Sharp's self-interest influenced his decision to advise petitioner to plead guilty, or even if Sharp's self-interest was the determining factor for his decision to advise petitioner guilty, Sharp's conflicting self-interest cannot be shown to have adversely affected his performance under the link test applied by the Court of Appeals.

In fact, under the test applied by the Court of Appeals, adverse effect exists only in two circumstances. If there was no plausible reason to support a lawyer's decision between alternative strategies other than the conflicting interest, or where a lawyer chooses between alternative strategies that will affect two clients in the opposite way.

In *Sullivan* and *Wood*, the Court described an "adverse effect" of an actual conflict to include circumstances where a conflict "impaired" the defense, influenced counsel's strategic decisions, or precluded counsel from pursuing the interests of his client "single-mindedly." *Sullivan*, 446 U.S. at 349; *Wood*, 450 U.S. at 271-272. Under the link test applied by the Court of Appeals, none of these circumstances would be deemed to constitute an adverse effect. The link test for adverse effect applied by the Court of Appeals is therefore inconsistent with *Sullivan*, and it also denigrates the value the Sixth Amendment right to conflict-free counsel, as it allows violations of that right to go unremedied.

2. The "likely affected" standard for adverse effect is consistent with *Sullivan* and limits relief to meritorious claims.

Other circuits read the "adverse effect"of conflicts that *Sullivan* deems presumptively prejudicial more broadly. For example, the Seventh Circuit deems an actual conflict to have adversely affected counsel's performance if but for the attorney's actual conflict, there is "'a [reasonable]likelihood that counsel's performance would have been different." *Stoia v. United States*, 22 F.3d 766, 771 (7th Cir. 1994), *quoting*, *Frazier v. United States*, 18 F.3d 778, 787 (9th Cir. 1994). The Ninth Circuit deems an actual conflict that "likely affected" counsel's performance with respect to particular aspects of the case to constitute an adverse effect. *United States v. Mett*, 65 F.3d 1531, 1535 (9th Cir. 1995) ("need only show that some effect on counsel's handling of particular aspects of the trial was likely"), *quoting*, *United States v. Miskinis*, 966 F.2d 1263, 1268 (9th Cir. 1992).

These formulations of adverse effect include within their scope circumstances in which an actual conflict "influences" counsel's strategic decisions, or "impairs" the defense, or prevents the lawyer from pursuing the interests of his client "single-mindedly." *Sullivan*, 446 U.S. at 349; *Wood*, 450 U.S. at 271-272. At the same time, they do not provide relief based on a showing of an actual conflict alone, or where there the relationship between a conflict and a strategic decision is speculative or tenuous. By striking this balance, the "likely affected" and "reasonable probability" formulations of adverse effect are true to *Sullivan* and provide a sound basis for presuming the actual conflict to be prejudicial.

3. Lawyer self-interest conflicts present special problems in determining adverse effect.

The adverse effect requirement was adopted in the context of a mutual representation conflict and was intended to identify when an actual conflict in the interests of clients represented by the same lawyer should be presumed prejudicial. *Sullivan*, 446 U.S. at 350. As some courts have suggested, the criteria for determining adverse effect from a mutual representation conflict, is not necessarily well-suited for determining adverse effect from a lawyer's self-interest conflict. *See Freund*, 165 F.3d at 886 (Tjoflat, J., dissenting); *Stoia v. United States*, 22 F.3d at 770, n.3 (courts continue to apply same test to both, "even though the fit is less than perfect.")

In a mutual representation conflict, an actual conflict exists when a lawyer is in the position of having to make a strategic decision as to which the interests of his clients diverge. *Gambino*, 864 F.2d at 1070. In that circumstance, the client harmed by the lawyer's decision can prove the conflict caused the lawyer's decision not to pursue the alternative strategy that favored him, because but-for the interests of the other client, there would have been no reason for the lawyer not to pursue the alternative strategy. *See Stoia*, 22 F.3d at 770, n.3.

In a lawyer self-interest conflict, an actual conflict exists when a lawyer is in the position of making a strategic decision on behalf of a client that will affect the lawyer's personal interest differently depending upon the decision. *See Freund*, 165 F.3d at 886 (Tjoflat, J., dissenting). In that circumstance, proving the lawyer's self-interest caused the lawyer's decision not to pursue one alternative strategy over another, is practically impossible, absent an admission. The lawyer must decide which alternative that will advance the interests of the client the most, not between one alternative that will advance the client's interest and another that will harm it. Given that the lawyer is choosing between competing plausible strategic alternatives, the conflict can never be isolated as the cause-in-fact for the lawyer's decision.

Again, this case illustrates the point. The alternatives of trial or plea were not ones that conversely advanced or harmed petitioner's interests. They were competing plausible alternatives, with arguments for and against each. On the other hand, it was in Sharp's personal interest for petitioner to plead guilty, and contrary to Sharp's interest for petitioner to proceed to trial. Nevertheless, Sharp's personal interest cannot be proved to have caused his decision to advise petitioner to plead guilty under the link test, because other reasons could be given for recommending the alternative of a guilty plea.

Lawyer self-interest conflicts can and often do result in compromised representation, and results which for that reason cannot be considered reliable. Once unheard of, lawyer self-interest conflicts are becoming increasingly common. To require in a lawyer self-interest conflict that a petitioner prove subjectively that the lawyer's self-interest was the cause-in-fact for the lawyer's decision not to pursue a strategic alternative, would be to exempt such conflicts from enforcement and deprive those harmed by them of a remedy. Thus, if the adverse effect standard of *Sullivan* does require a petitioner to demonstrate that the conflict caused counsel's decision not to pursue an alternative strategy, a new standard needs to be established for determining adverse effect for purposes of lawyer self-interest conflicts.

CONCLUSION

The original conflicts rules of *Sullivan* simply don't work well in the context of attorney-client crime conflicts. This fact is well-demonstrated by the split in the Circuits over a *per se* prejudice rule and in the differing adverse effect tests that have emerged. At a time when more lawyers are being investigated and prosecuted, it is important to the criminal justice system that its conflict rules be clear and uncompromising. For all the foregoing reasons, this Court should issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit to review the questions presented in this petition.

Respectfully submitted,

MICHAEL S. PASANO
Zuckerman, Spaeder,
Taylor & Evans
201 Biscayne Boulevard,
Suite 900
Miami, Florida 33131
(305) 579-0110

WILLIAM J. GENEGO*
Nasatir, Hirsch,
Podberesky & Genego
2115 Main Street
Santa Monica, CA 90405
(310) 399-3259

Counsel for Petitioner
JOE HARRY PEGG

* Counsel of Record

Supreme Court, U.S.
FILED
(2)

01 816 NOV 01 2001

No. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

JOE HARRY PEGG,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI

MICHAEL S. PASANO
Zuckerman, Spaeder,
Taylor & Evans
Suite 900
201 S. Biscayne Boulevard
Miami, FL 33131
(305) 579-0110

WILLIAM J. GENEGO*
Nasatir, Hirsch, Podberesky
& Genego
2115 Main Street
Santa Monica, CA 90405
(310) 399-3259

Counsel for Petitioner
JOE HARRY PEGG

* Counsel of Record

4900

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 99-11287-JJ

JOE HARRY PEGG,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

On Appeal from the United States District Court
for the Middle District of Florida

Filed August 3, 2001

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion ________________, 11th Cir., 19 ___,
_______ F.2d _____).

Before: CARNES and RONEY, Circuit Judges, and ALAIMO*, Distict Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

Paul H. Roney,
United States Circuit Judge

---

* Honorable Anthony A. Alaimo, U.S. District Judge for the Southern District of Georgia, sitting by designation.

APPENDIX B

253 F.3d 1274

Joe Harry PEGG,
Petitioner-Appellant,
v.
UNITED STATES of America,
Respondent-Appellee.

No. 99-11287.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

June 12, 2001, Decided

June 12, 2001, Filed

Before CARNES and RONEY, Circuit Judges, and ALAIMO *, District Judge.

* Honorable Anthony A. Alaimo, U.S. District Judge for the Southern District of Georgia, sitting by designation.

RONEY, Circuit Judge:

Defendant Joe Harry Pegg was convicted on his plea of guilty to one count of conspiracy to import marijuana in violation of 21 U.S.C. § 963, and given a 360-month sentence. He appeals the denial of his 28 U.S.C. § 2255 collateral attack on that conviction with a single issue: the district court erred in not letting him withdraw his guilty plea, either before or after sentencing, on the ground that his attorney had a conflict of interest that deprived him of his constitutional right to effective assistance of counsel. After a four-day evidentiary hearing, the district court determined that, although one of his attorneys did indeed have a conflict of interest in Pegg's going to trial, the conflict of interest of that attorney did not deprive Pegg of effective assistance of counsel. *See United States v. Pegg*, 49 F. Supp. 2d 1322 (M.D. Fla. 1999). That finding being neither clearly erroneous nor contrary to law, we affirm.

1. *The Facts Concerning the Guilty Plea.*

The facts of this case unfolded over a sixteen-year period. Pegg became acquainted with Washington, D.C. attorney James E. Sharp in 1981 when Sharp represented Pegg in a joint federal and state marijuana prosecution. Pegg and Sharp became good friends thereafter, and Sharp continued to represent Pegg on and off through their friendship. In March 1994, a federal grand jury in Tampa, Florida returned the indictment that is the subject of this appeal. Pegg was charged as one of several individuals who conspired to import marijuana into the United

States in 1988 and 1989. Pegg asked Sharp and Tom Lankford, Sharp's law partner, to represent him in the matter, and both Sharp and Lankford agreed. Sharp engaged John Fitzgibbons, a Tampa attorney, to be local counsel for Pegg in the case. Cynthia Collazo, the Assistant United States Attorney ("AUSA") assigned to prosecute Pegg's case, frequently discussed the possibility of a plea agreement with all three of Pegg's attorneys. They also discussed the likelihood that Pegg could receive a reduced sentence if he entered into a plea agreement and cooperated with the government.

In September 1994, AUSA Collazo was contacted by the attorney for Reggie Baxter, a co-conspirator of Pegg's who became a government witness. Baxter's attorney explained to AUSA Collazo that Sharp may have had privileged conversations with Baxter that would cause Sharp a conflict of interest in representing Pegg. AUSA Collazo instructed a federal agent to interview Baxter and also sent a letter to Sharp and Lankford alerting them that Sharp's contact with Baxter might have caused a conflict of interest. Sharp and Lankford denied the existence of any conflict of interest. AUSA Collazo then interviewed Baxter at the federal lock-up facility. In unsworn statements, Baxter told AUSA Collazo that shortly after he had been arrested in 1992 for participating in the marijuana importation conspiracy charged in the instant case, Sharp had met with him and arranged for Pegg to pay a portion of Baxter's legal fees. Baxter then stated that Pegg had retained attorney Dick Hibey to represent Baxter in the case. Baxter further claimed that Sharp and Hibey helped him concoct a false story to help exculpate Pegg.

AUSA Collazo expressed concern that Baxter's allegations regarding Sharp would come up at trial and affect Sharp's ability to represent Pegg. AUSA Collazo notified Sharp, Lankford, and Fitzgibbons that they should alert the district court of the potential conflict. Fitzgibbons told AUSA Collazo that even if Sharp was disqualified from representing Pegg, he could try the case and win. On November 17, 1994, AUSA Collazo prepared a motion to disqualify Sharp and Lankford. When Sharp and Lankford received the motion for disqualification, they, along with Fitzgibbons, were preparing to go to trial and did not intend to enter a guilty plea. Pegg's attorneys collectively discussed the conflict issue and decided that, in the event Sharp ended up having to testify at trial, Fitzgibbons would assume the role of lead attorney in the case. The attorneys discussed with Pegg the nature of Sharp's conflict, and the possible consequences of Sharp continuing to serve as his counsel, and the possibility that Sharp may need to disqualify himself from the case. Pegg begged Sharp not to withdraw from the case, saying "don't abandon me."

On November 28, 1994, Pegg, Sharp, Lankford, and Fitzgibbons appeared in court prepared to argue the government's disqualification motion and other pretrial motions. Unexpectedly, Bernie Getchman, another co-defendant in the case whose counsel had previously advised Pegg's attorneys that he was definitely going to trial, pled guilty to all the charges in the indictment. During his plea colloquy, Getchman testified that Pegg had hired him to direct, organize, and control the marijuana importation and that he had done so at Pegg's direction. The district court granted the parties a continuance until the following day to attempt to negotiate a plea in the case.

AUSA Collazo, Sharp, and Lankford met and agreed that Pegg should submit to an interview by a Drug Enforcement Agency ("DEA") agent to see if Pegg had any information that would be helpful to the government. The DEA agent told Pegg that if he cooperated with the government, the government would likely move to reduce his sentence below that required by the sentencing guidelines. In Pegg's presence, Fitzgibbons, an experienced federal trial attorney in Tampa, suggested that Pegg was likely to get a good deal at sentencing, predicting that the sentencing judge was likely to sentence him to time served, if he entered a guilty plea, turned over monetary assets, and cooperated in interviews with the DEA.

Pegg's attorneys negotiated a written plea agreement with the government, which they brought to Pegg that evening. The three lawyers collectively decided that it was in Pegg's best interest to plead guilty, and Pegg agreed. During the plea colloquy, Pegg appeared calm and coherent and never raised any issue regarding Sharp's conflict of interest. The district court qualified the plea and went through a few questions that were meant to show Pegg's waiver of Sharp's conflict of interest.

Pegg was not sentenced until fifteen months after he had entered his guilty plea. Fitzgibbons represented Pegg during the sentencing hearing on February 16, 1996. Prior to sentencing, Pegg was afforded several opportunities to cooperate with the government. The interviewing DEA agent noted, however, that Pegg had not been truthful in the interviews. Because Pegg had not complied with the terms of the plea agreement to date, Fitzgibbons did not want to proceed with sentencing that day and requested a continuance. Once Pegg realized that the government had not filed a motion for downward departure from the sentencing guidelines, Pegg told Fitzgibbons that he wanted to withdraw his plea. The district court denied Pegg's request.

2. *The Standard For Relief For Conflict of Interest.*

To obtain relief on a case of this kind, a defendant must show *first,* that his attorney had an actual conflict of interest, and *second,* that the conflict adversely affected counsel's performance. *See Freund v. Butterworth*, 165 F.3d 839, 858 (11th Cir. 1999). In order to establish a violation of the Sixth Amendment, a defendant "must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 350, 64 L. Ed. 2d 333, 100 S. Ct. 1708 (1981); *see also Freund*, 165 F.3d at 858. A § 2255 petitioner must show "'inconsistent interests and must demonstrate that the attorney made a choice between possible alternative courses of action....'" *McConico v. Alabama*, 919 F.2d 1543, 1546 (11th Cir. 1990) (quoting *Smith v. White*, 815 F.2d 1401, 1404 (11th Cir. 1987)).

a. *The Attorney's Conflict of Interest.*

As to the first prong of the showing Pegg had to make, the district court found and the government does not deny that Sharp labored under an actual conflict of interest created by co-conspirator Baxter's allegations that Sharp had engaged in unethical and criminal activity in connection with his representation of Pegg.

b. *No Adverse Effect on Assistance of Counsel and the Guilty Plea.*

As to the second prong, even if an actual conflict of interest exists, there must be proof that the conflict adversely affected counsel's performance in order to rise to the level of a Sixth Amendment violation. *See Buenoano*, *United States v. Buenoano*, 74 F.3d 1078, 1086 (11th Cir. 1996) ("In assessing whether an actual conflict adversely affected counsel's representation, ' a petitioner need not show that the result of the trial would have been different without the conflict of interest, only that the conflict had some adverse effect on counsel's performance.'" (quoting *McConico*, 919 F.2d at 1548)).

To prove adverse effect, a habeas corpus petitioner must show: (1) the existence of a plausible alternative defense strategy or tactic that might have been pursued; (2) that the alternative strategy or tactic was reasonable under the facts; and (3) a link between the actual conflict and the decision to forgo the alternative strategy of defense. *See Freund*, 165 F.3d at 860 (holding that a petitioner must establish that the alternative defense strategy was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests); *see also Burden v. Zant*, 24 F.3d 1298, 1305 (11th Cir. 1994). If there is a guilty plea involved, this Court looks at whether the attorney's actual conflict adversely affected the defendant's decision to plead guilty. *See, LoConte v. Dugger*, 847 F.2d 745, 755 (11th Cir. 1988).

In a four-day evidentiary hearing on the instant § 2255 motion, the district court heard extensive testimony from Pegg's attorneys and others involved in the events leading up to the entry of Pegg's guilty plea. The record shows that Pegg had the advice of several attorneys and that the plan under which Pegg was to enter his guilty plea was devised by Fitzgibbons, an attorney who did not act under any conflict of interest. During his testimony Sharp denied Baxter's incriminating allegations that he had concocted a plan to fabricate a story to the DEA. Even though Sharp acknowledged that he had briefly met with Baxter, Sharp testified that he refused to discuss the case with Baxter further once Baxter conveyed to him that he had information that incriminated Pegg. Sharp also acknowledged that he and Pegg had had a personal and professional relationship for several years and that Pegg had begged Sharp to remain as his counsel in this case. Sharp admitted that Baxter's allegations upset him, that he was concerned about his own interest, but insisted he put his client's interest first and foremost in assisting Pegg in making the decision to plead guilty. Sharp also testified concerning the active involvement of Pegg's other attorneys, who decided collectively that it would be in Pegg's best interest to plead guilty. Fitzgibbons testified that he had devised and promoted the plan for Pegg to plead guilty and to cooperate with the government in order to receive a reduced sentence. Fitzgibbons further testified that although Pegg struggled with the decision to plead guilty, he believed that at the time Pegg entered the plea he wanted to do so.

Furthermore, the reasoning of Pegg's attorneys' collective recommendation for Pegg to plead guilty is clearly supported by the record. If Pegg had not pleaded guilty, Getchman, a co-conspirator turned government witness, would have testified against Pegg at trial and his testimony would have been devastating to Pegg's case. Although there was a clear alternative to the chosen defense strategy – to go to trial – there is evidence in the record to support the district court's finding that Sharp's performance was not adversely affected by Baxter's allegations. Pegg's assertion that Sharp avoided the publication at trial of Baxter's allegations against Sharp is at best speculative, and the collective recommendation by Pegg's attorneys for Pegg to plead guilty was in Pegg's best interest at the time of his sentencing.

The record amply supports the decision of the district court that Pegg did not receive ineffective assistance of counsel because of the conflict of interest of his attorney, James E. Sharp.

3. *Inapplicability of Per Se Rule.*

Pegg urges this Court to adopt the Second Circuit's holding in *United States v. Fulton*, 5 F.3d 605 (2d Cir. 1993), in which the court held there to be a *per se* violation of the Sixth Amendment not subject to waiver by the defendant under the circumstances of that case. In the middle of the trial at issue in *Fulton,* the government informed the court in an *ex parte* conference that the government witness on the stand previously stated that he had once imported heroin for defendant Fulton's trial counsel. *See, id.* at 607. In spite of the fact that this implicated counsel in the very crime for which Fulton, the defendant, was being tried, the court permitted counsel to continue to represent defendant in the trial. *See Fulton,* 5 F.3d at 608. The Second Circuit held this to be error. *See Fulton*, 5 F.3d at 612. Relying on its precedent, the Second Circuit noted that there is a *per se* violation of defendant's Sixth Amendment right to effective assistance of counsel without the necessity of showing an adverse effect as required by *Cuyler v. Sullivan*, 446 U.S. 335, 64 L. Ed. 2d 333, 100 S. Ct. 1708 (1981), "when the attorney has engaged in the defendant's crimes." *Fulton*, 5 F.3d at 611.

Even if there may be circumstances under which a *per se* rule should be applied, in our judgment *Fulton* would not require a reversal in this case. In limiting language in *Fulton* the court cautioned that where the district court could rule out the possibility that the allegations are true through an evidentiary hearing, a waiver is possible. *Fulton*, 5 F.3d at 613. There was an evidentiary hearing in this case, and the district court was not clearly erroneous in accepting "Sharp's uncontroverted testimony that Baxter's allegations were false." *Pegg*, 49 F. Supp. 2d at 1332.

Furthermore, the accusation in *Fulton* that counsel was involved in the alleged crime would seem to affect counsel's handling of the trial. In addressing the defendant, the district court in *Fulton* said:

> "... you understand that first of all lead trial counsel will be to some extent distracted by this and, secondly, that he will not be able to cross-examine the witness about this ..."

Fulton, 5 F.3d at 608 (quoting the district court).

In this case, there was no trial, and there was no proffer of sworn testimony from Baxter to contradict the sworn testimony from Sharp that Baxter's allegations were false. *See Pegg*, 49 F. Supp. 2d at 1332. The allegations in this case involve counsel's representation of the defendant in preparation for trial, and actions that would become a problem to counsel only if there were a trial. The allegations did not involve a charge that counsel was involved in the crime with which defendant was charged. The proceedings remained at a stage during which Sharp could continue to let Pegg's interest trump any interest he might have if the case went to trial. There was an able conflict-free counsel, Fitzgibbons, available to defend Pegg in the event of a trial. Fitzgibbons was available to Pegg and did assist him in assessing the strategy and devising a plan for Pegg to plead guilty in the hopes of receiving a reduced sentence. There is no reason, under the facts of this case, to presume that the defendant suffered a violation of his Sixth Amendment right to counsel in connection with his entry of a guilty plea.

The district court properly denied Pegg's petition for relief under 28 U.S.C. § 2255.

AFFIRMED.

APPENDIX C

49 F. Supp.2d 1322

UNITED STATES OF AMERICA
v.
JOE HARRY PEGG

CASE NO. 94-38-CR-FTM-17D

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, FORT MYERS DIVISION

April 28, 1999, Decided

Before Elizabeth A. Kovachevich, UNITED STATES DISTRICT JUDGE.

ORDER

Before the Court is the defendant's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (Doc. 348) filed on February 2, 1997. The government filed a response (Doc. 357) on April 4, 1997. As grounds for his motion the defendant alleges that: 1) his counsel was ineffective based on a conflict of interest arising out of his counsel's own self-interest and concerns, and 2) the Court abused its discretion in denying the defendant's motion to withdraw his guilty plea. An evidentiary hearing has been held on the defendant's claims. Because the evidence does not support the claims, the defendant's motion will be DENIED.

I. FACTS

A. Background

In November of 1988, the defendant arranged to have a ship, the *Turtola*, leave Colombia with approximately 20,000 pounds of marijuana. The *Turtola* was to transport the marijuana to the Florida Keys. Bernie Getchman, one of the co-defendants in this case, was responsible for the off-load of the marijuana into the Florida Keys, where the marijuana would be trans-shipped for a later sale. Only approximately 5,000 pounds of the marijuana was successfully imported to the United States and ultimately sold.

Sometime in early 1989, the defendant made arrangements for another shipment from Colombia to the Florida Keys aboard the *Turtola*. This time a co-conspirator named Reggie Baxter was responsible for the off-load and importation of the marijuana into the United States. Once in the Florida Keys, the marijuana aboard the *Turtola* was to be transported to several boats launched from the area of Marco Island, Florida. However, the *Turtola* was intercepted by the United States Coast Guard and only one of the boats succeeded in taking approximately 5,000 pounds of marijuana.

The rest of the marijuana aboard the *Turtola* was seized by the Coast Guard. R. Doc. 179, pp. 15-16.[1]

In May, 1990, Baxter was indicted for his involvement in the marijuana importation aboard the *Turtola*. In February, 1991, Baxter pled guilty to the marijuana importation and agreed to cooperate with the government.

On March 29, 1994, the grand jury returned a two count sealed indictment against the defendant and others, including Getchman. The first count charged the defendant with conspiracy to import marijuana in November, 1988. The second count charged the defendant with conspiracy to import marijuana in April, 1989. On June 10, 1994, the indictment was unsealed and the defendant was arrested at his home that morning. R. Doc. 363, p. 5.

After the defendant was transported to the Middle District of Florida, James E. Sharp and Vernon Thomas Lankford, of the Washington, D.C. firm of Sharp and Lankford, entered an appearance in this case as the defendant's counsel. *Id.* Sharp is a nationally renowned criminal trial lawyer, a former federal prosecutor, and a member of the American College of

---

[1] Citations to the record will be as follows: R. Doc. [Docket Number].

Trial Lawyers. R. Doc. 405, p. 38. Sharp's attorney-client relationship with the defendant began in 1981, when Sharp represented the defendant in related state and federal marijuana prosecutions. R. Doc. 404, pp. 101-108. At the time Sharp and Lankford entered an appearance in this case, Sharp was also representing the defendant and other members of the defendant's family in a civil forfeiture matter in the Eastern District of Louisiana. R. Doc. 397, p. 172.

On August 8, 1994, John M. Fitzgibbons filed a notice of appearance in the case as local counsel. R. Doc. 95. Fitzgibbons, a well-known Tampa criminal attorney with 24 years of experience, and a Board Certified Criminal Trial attorney, had started his own practice in 1987. Before going into private practice, Fitzgibbons served as a state and federal prosecutor, a special counsel to the House of Representatives Small Business Committee, and in the Public Integrity Section of the Justice Department. R. Doc. 404, pp. 4-8. Originally, Fitzgibbons's role in the defendant's case was limited to that of local counsel. Fitzgibbons was not expected to actively participate in the defense or in the trial. R. Doc. 404, p. 15.

In a letter dated September 2, 1994, counsel for the government, Assistant U.S. Attorney Cynthia Hawkins (later Cynthia Hawkins Collazo) solicited Sharp's position with regard to a potential conflict of interest based on Sharp's contact with Baxter, who would testify at trial against the defendant. Sharp's partner, Lankford, telephoned Collazo in response to the letter and denied the existence of any conflict of interest. R. Doc. 398, p. 135 & R. Doc. 404, p. 117.

On October 11, 1994, the defendant's trial was continued from October 17, 1994, to November 28, 1994. Sometime in September or October, 1994, Collazo advised Sharp that, unless the defendant entered a guilty plea, the government would file a motion to disqualify Sharp based on the alleged conflict of interest. Sharp responded that if the Court granted the motion for disqualification, Fitzgibbons could try the case. R. Doc. 404, pp. 217-18, 269. A week or two before the trial, Sharp and Lankford asked Fitzgibbons to travel to Washington D.C. to meet with them. R. Doc. 404, pp. 15-16. When he arrived in Washington, Fitzgibbons met with several attorneys. Fitzgibbons remembered that the conflict issue was discussed and that at some point he was told that he might have to step in and try the case as first chair. R. Doc. 404, p. 17.

Approximately two weeks before the trial date, Sharp informed Collazo that the defendant would proceed to trial. On November 18, 1994, the government faxed a copy of the proposed "Government's Motion to Disqualify Counsel for the Defendant Pegg." In the motion, the government argued that the evidence would show that Sharp had a prior relationship with Baxter and that Sharp was involved in unethical and criminal conduct related to the charges for which the defendant was to stand trial. The government's motion also implicated attorney Richard Hibey in the wrongdoings. Hibey, a well-known Washington D.C. attorney, had represented Baxter when Baxter was indicted and pled guilty to the 1989 marijuana importation. Hibey was a close personal friend of Sharp. R. Doc. 404, p. 122.

The government alleged in the disqualification motion that after Baxter's indictment, but before the defendant's indictment, the defendant arranged a meeting between Sharp and Baxter. In that meeting, Baxter allegedly discussed the facts of the April, 1989, importation with Sharp and Sharp arranged to meet with Baxter again in the future. The motion further stated that at a later date Sharp introduced Baxter to Hibey, and the three of them agreed that the defendant would pay for a portion of Baxter's legal fees. Baxter was allegedly aware that Sharp and Hibey had further conversations regarding the extent of Baxter's cooperation with the government. In the motion, the government stated that Baxter would testify that Hibey had discussed with Baxter a version of the events to tell the government that was false and that Baxter would testify as to Sharp's role in concocting that story. R. Defendant's Evidentiary Hearing Exhibit 1.

The disqualification motion identified three separate grounds for disqualification of the firm of Sharp and Lankford from the defendant's representation:

1) Sharp had a conflict between his duty to the defendant and his duty to Baxter because Sharp entered into an attorney-client relationship with Baxter that involved privileged communications;

2) Sharp was subject to being called as a witness against the defendant due to his personal knowledge of the alleged arrangement concerning the defendant's payment of part of Baxter's legal fees;

3) "the integrity of the court" required Sharp's disqualification because Baxter would testify that Sharp was involved in concocting a false story to the Drug Enforcement Administration Agents to exculpate the defendant.

In the motion, the government argued that if the defendant proceeded to trial, Sharp's disqualification was mandatory and could not be waived by the defendant. The defendant argues that a fourth ground for disqualification, which is the basis for the instant motion to vacate, was created by the government's making the disqualification of Sharp and Lankford conditional upon the defendant's proceeding to trial. The defendant argues that making the disqualification contingent upon whether the defendant went to trial made it in the firm's best interest to avoid the publication of Sharp's alleged unethical and criminal conduct at trial by convincing the defendant to plead guilty. The Court notes that the disqualification motion was never filed with the Court.

B. Evidentiary Hearing

At the evidentiary hearing on the instant motion, Sharp vehemently denied Baxter's accusations of impropriety. According to Sharp's testimony at the evidentiary hearing, Sharp only met with Baxter once. At that meeting, Baxter started to relate to Sharp the facts of a marijuana importation. Baxter mentioned the defendant's name and at that point in the conversation Sharp stopped Baxter and told him "I don't even want to talk anymore. I certainly can't represent you." R. Doc. 404, p. 119. Baxter begged Sharp to take his case and Sharp refused. R. Doc. 404, p. 120. Baxter kept calling Sharp and asking him to represent him. Finally, Baxter asked Sharp if he could refer Baxter to another attorney. Sharp called Hibey and asked Hibey if he would agree to talk to Baxter. Hibey agreed to do it. Hibey then became Baxter's counsel. R. Doc. 404, p. 122.

The testimony presented at the hearing revealed that as soon as the firm of Sharp and Lankford received the copy of the disqualification motion, they started preparing a response. Paul Castellito, an associate at the firm, was the attorney assigned to draft the response to the disqualification motion. R. Doc. 397, p. 92 & R. Doc. 404, p. 125. The response to the motion was never filed with the Court.

Paul Knight, an attorney at the firm of Sharp and Lankford at the time, testified at the hearing that Sharp was overly concerned with regard to the disqualification motion, and that the disqualification issues became Sharp's primary focus and concern in the days before trial. R. Doc. 397, pp. 176 & 225-228. Further, Castellito testified that Sharp was concerned about the allegations of improper conduct and their effect on him personally. R. Doc. 397, p. 93. In his testimony, Sharp admitted that he was concerned about the government's allegations of impropriety. However, Sharp stated that he always placed the defendant's interests first. During his testimony, Sharp said "if you begin with yourself, you are doing it wrong. If you begin with the impact on [the client], you're doing it right." R. Doc. 404, p. 236. Sharp further stated "I was concerned about myself. I don't want to discount that at all . . . But also, make no mistake about it, I was not going to sell [my client] out for myself." R. Doc. 404, p. 273.[2]

---

[2] To the extent that Sharp's testimony might be contrary to Knight's and Castellito's version of the events, the Court accepts Sharp's testimony as

On November 28, 1994, the day the defendant's case was scheduled for trial, Bernie Getchman entered a guilty plea and identified the defendant, Joe Pegg, as one of his co-conspirators. R. Doc. 263, p. 12 & R. Doc. 404, p. 136. After Getchman entered his guilty plea, Sharp asked the Court for a moment to speak with co-counsel. Sharp testified that he believed that Getchman's testimony could tilt the balance against the defendant. R. Doc. 404, p. 138. Getchman pled guilty to the charges in the indictment without the benefit of a plea agreement. Sharp believed that because Getchman did not have a plea agreement, there was a good possibility that after the plea Collazo would offer Getchman a reduced sentence in return for Getchman's testimony against the defendant. R. Doc. 404, p. 137.

Sharp consulted with Fitzgibbons and the other attorneys from his firm that were present at the time. Fitzgibbons testified that, at that point, it became "pretty clear fairly quickly that Judge Kovachevich [the undersigned] would be the sentencing judge." R. Doc. 405, pp. 40-41. Fitzgibbons advised Sharp that if the defendant pled guilty and this Court were to impose the defendant's sentence, if the defendant agreed to

---

correct. In making this credibility determination, the Court relies on the demeanor of the witnesses and on their relative forthrightness in responding to questions.

cooperate with the government, this Court would reward the defendant's cooperation. Fitzgibbons told Sharp that this Court was known to reward and give lenient sentences to cooperators. R. Doc. 404, pp. 29-30 & 140. Sharp believed that by pleading guilty, the defendant could avoid the Getchman problem and perhaps get a favorable venue for his sentencing. R. Doc. 404, p. 141. After consulting with Fitzgibbons, Sharp informed the trial judge, Honorable Lee P. Gagliardi, that he believed the parties could resolve the case without going to trial and requested a ten-day continuance. Judge Gagliardi denied the request for a ten-day continuance and gave the parties 24 hours to resolve the issue of whether the defendant would plea or would proceed to trial.

At the time Sharp informed Judge Gagliardi that he believed the case could be resolved without a trial, the defendant's plea agreement had not been drafted and Sharp had not discussed the possibility of a plea with the government in at least two weeks. R. Doc. 397, p. 181 & Doc. R. 404, pp. 195-96.

The government provided the defendant with a proposed plea agreement sometime during the day on November 28, 1994. Under the terms of the agreement, the defendant was required to cooperate with the government and to forfeit $ 8 million. The forfeiture amount was reduced to $ 4 million during the plea negotiations. Pursuant to the plea agreement, in return for the defendant's cooperation and forfeiture, the government would dismiss one of the counts of the indictment, would not file second offender papers, and would recommend a reduction in the defendant's sentencing score sheet for acceptance of responsibility. If the defendant failed to provide the government substantial assistance, his guideline sentence range would be 360 months to life imprisonment. R. Doc. p. 179.

The defendant agonized over whether he should plead guilty or go to trial. Before signing the plea agreement, the defendant had extensive meetings with his attorneys. During those meetings, the defendant voiced his concern with regard to the forfeiture amount. The defendant asked Sharp "Where are we going to get that money?" R. Doc. 404, p. 146. However, even though money was an issue, Sharp testified that he assumed the defendant's brother William (Bucky) Pegg would come up with the money. Sharp stated "I think that was a realistic assumption." R. Doc. 404, p. 254. Before proceeding to explain his belief that Bucky Pegg could provide the forfeiture money was a realistic, Sharp asked the defendant's counsel whether that information was within the scope of the attorney-client privilege that had not been waived by the defendant. Without responding to Sharp's inquiry, the defendant's counsel withdrew the question.[3] *Id.* Sharp then stated, "I was sure [the defendant and his brother] could come up with [the money]." R. 404, 255.

Also, during the meetings the attorneys discussed with the defendant the issues raised by the government's disqualification motion and the different conflicts of interest raised in the motion. Fitzgibbons testified that the conflict issue was discussed by the lawyers in front of the defendant on several occasions. R. Doc. 405, p.6. However, the defendant was adamant that he wanted Sharp to represent him. R. Doc. 404, p. 287. Sharp and Fitzgibbons testified that they did not advise the defendant of his right to consult an independent counsel on the conflict issue because they believed that the defendant would refuse to do it. R. Doc. 404, pp. 287-88, 290 & R. Doc. 405, pp. 43-44.

Sharp testified that at one point he considered that it could be better to address Baxter's allegations in court and deny them. However, before making the final determination Sharp had to take into account the impact that Sharp's testimony, if he was required to testify, would have on the defendant's case. Sharp stated that if he were to take the stand to contradict Baxter's allegations, there was a strong possibility that

---

[3] At all times during the evidentiary hearing, the defendant's attorneys tried to avoid any inquiries directed to the defendant's finances.

Sharp would have to testify regarding the contents of his first conversation with Baxter and that in that conversation Baxter implicated the defendant in the 1989 importation. Accordingly, Sharp believed that his testimony at trial could severely hurt the defendant's case. R. Doc. 404, p. 202.

Finally, after much deliberation, the defendant signed the plea agreement sometime late on November 28, 1994. Sometime before the defendant pled guilty, Collazo had made it clear that neither Sharp nor Hibey was the target of a government investigation. It is not clear from the record whether Collazo informed Sharp personally or someone else conveyed the information to Sharp. Sharp did not remember whether it was Collazo or Hibey who had told him that he was not a target. R. Doc. 404, pp. 124 & 226-8. Also, the record is not clear as to whether Sharp learned that he was not a target on or before November 28, 1994, date in which the trial was scheduled to begin.

On November 29, 1994, the defendant pled guilty pursuant to the plea agreement. At the plea hearing Judge Gagliardi inquired regarding the conflict issues. Specifically, the inquiry consisted of the following:

THE COURT: Some issue has arisen as to whether or not there may be a conflict in [defense counsel's] representation of you. You are familiar of that, are you not?

THE DEFENDANT: Pretty much so. I understand the situation, but I am happy with my counsel.

THE COURT: You are happy, you are content, in light of the fact that there may be a problem with respect to their representation of you in this matter?

THE DEFENDANT: Yes.

THE COURT: You are content to have them represent you?

THE [DEFENDANT: Yes, I do.

THE COURT: Do you waive any conflict of interest they may have in connection with this matter?

THE DEFENDANT: Yes.

THE COURT: All right. . .

R. Doc. 345, pp. 3-4.

Fitzgibbons testified that when the defendant pled guilty he was satisfied with the defendant's understanding of the conflict of interest issues. Fitzgibbons stated that ethically he had no doubt in his mind that, when the defendant was questioned by Judge Gagliardi on the conflict issue, the defendant understood the conflict. R. Doc. 405, p. 7. Further, Fitzgibbons testified that, when the defendant entered his guilty plea, Fitzgibbons believed it was in the defendant's best interest to do so. Fitzgibbons stated:

> I was comfortable that [the defendant] wanted to [enter the plea] that day. I never would have stood before a Federal Judge and said the things I said if I felt somebody had coerced [the defendant] or forced [the defendant] to do it. I would not do it. I wouldn't have signed my name to the plea agreement.

R. Doc. 405, pp. 42-43. Fitzgibbons further testified,

> I felt as a lawyer that the [conflict] issue had been presented to the client in a fair way; that the ups and downs, the pros and cons were all laid out for the client; the risks, the strategic decisions, all of this, this was aired thoroughly. And when it came time for the plea, that the decision that [the defendant] made was a decision he felt comfortable with.

R. Doc. 405, p. 44.[4]

After the defendant entered his guilty plea, he informed his lawyers, including Fitzgibbons, on several occasions that he wanted to withdraw his plea. However, Fitzgibbons believed that the defendant was just in an internal turmoil and was going back and forth as to what he wanted to do. R. Doc. 405, p. 12. Fitzgibbons testified that the discussions never reached the point where the defendant instructed his lawyers unequivocally that he wanted to withdraw his plea. R. Doc. 405, p. 13. Fitzgibbons stated "if he gave me an instruction to withdraw the plea, of course I would have filed something, or had the Washington lawyers file something." *Id.*

The defendant's sentencing date was continued on two occasions. On February 16, 1996, the date of the defendant's sentencing, Fitzgibbons moved for a third continuance. At a side bar conference, Fitzgibbons explained to the court that the defendant needed more time to cooperate with the government and to comply with the terms of the plea agreement. Further, Fitzgibbons expressed that the defendant was placed in an untenable situation before he pled guilty because of the accusations against his attorneys. However, Fitzgibbons told the Court that when the defendant pled guilty the defendant's attorneys:

---

[4] To the extent Fitzgibbons's testimony may be contradicted by the testimony of other witnesses, the Court accepts Fitzgibbons's version of the events as true.

> Felt under the circumstances there was a good chance [the defendant] was going to cooperate, and the money would come in. I think we are close from talking to everybody in this thing except for Southern Florida right now, I haven't dealt with them, but I think we're close on getting the money. My guy wants it to happen, otherwise you are going to have to sentence him to 30 years to life and he's done.

R. Doc. S-44, p. 11.

The Court denied the continuance and proceeded with the sentencing. The Court asked the defendant if he had discussed the presentence report with his lawyer. The defendant stated that he had not. Fitzgibbons stated that he had discussed the presentence report with the defendant about six months before the sentencing and asked for a moment to confer with his client. After conferring with the defendant, Fitzgibbons moved to withdraw the defendant's guilty plea. The Court denied the motion to withdraw. R. Doc. 342, pp. 2-7. The defendant did not appeal the Court's denial of his motion to withdraw. At the evidentiary hearing, Fitzgibbons testified that he did not believe, based on his professional experience, that an appeal of the motion to withdraw would succeed because Fitzgibbons did not feel the Court had abused its discretion in denying the motion. R. Doc. 405, p. 47.

II. CONFLICT OF INTEREST

A. Rules of Law

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to effective assistance of counsel. The right to assistance of counsel includes the right to conflict free representation. A counsel's duty of loyalty to his client includes "a duty to avoid conflicts of interest," which the Supreme Court considers "perhaps the most basic of counsel's duties." *Strickland v. Washington*, 466 U.S. 668, 690, 692, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). The right to conflict free counsel applies to plea proceedings as well as trials. *Hill v. Lockhart*, 474 U.S. 52, 57, 88 L. Ed. 2d 203, 106 S. Ct. 366 (1985).

1. Conflict of interest standard

"To establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance."

Cuyler v. Sullivan, 446 U.S. 335, 348, 64 L. Ed. 2d 333, 100 S. Ct. 1708 (1980). When the defendant shows that an actual conflict adversely affected his counsel's performance, prejudice is presumed and the defendant is entitled to relief. *Holloway v. Arkansas*, 435 U.S. 475, 490, 55 L. Ed. 2d 426, 98 S. Ct. 1173 (1978).

In cases like the one now before the Court, where the alleged conflict of interest involves the attorney's self-interest, an actual conflict exists when:

1) the attorney has engaged or has been accused of engaging "in wrongful conduct related to the charge for which the defendant is on trial." *United States v. Fulton*, 5 F.3d 605, 610 (2d Cir. 1993). The *Fulton* court held that when this happens

> It creates one of two actual conflicts. First, if the allegations are true . . . the attorney may feel that a spirited defense could uncover convincing evidence of the attorney's guilt or provoke the government into action against the attorney. Moreover, the attorney is not in a position to give unbiased advice to the client as to such matters as to whether or not to testify or to plead guilty and cooperate since such testimony or cooperation from the defendant may unearth evidence against the attorney . . . Second, even if the attorney is demonstrably innocent and the government's witness's allegations are plainly false, the defense is impaired because vital cross-examination becomes unavailable to

the defendant.

Id. (citations omitted); or

2) "a lawyer's own personal interest would be compromised by pursuing a particular defense theory." *Freund v. Butterworth*, 165 F.3d 839, 886 (11th Cir. 1999) (Tjoflat, J., dissenting), citing *United States v. McLain*, 823 F.2d 1457, 1463-64 (11th Cir. 1987).

A defendant who demonstrates the existence of an actual conflict must then show that the conflict had an adverse effect on the defendant's counsel's representation. Pursuant to *Freund v. Butterworth*, to prove adverse effect a defendant must satisfy three elements:

First, he must point to "some plausible alternative defense strategy or tactic [that] might have been pursued." *United States v. Fahey*, 769 F.2d 829, 836 (1st Cir. 1985); *see also*, *Porter [v. Wainwright*, 805 F.2d 930, 939-40 (11th Cir. 1986), *cert. denied*, 482 U.S. 918 (1987)]. Second, he must demonstrate that the alternative strategy or tactic was reasonable under the facts. Because prejudice is presumed, *see*, *Strickland*, 466 U.S. at 692, 104 S. Ct. 2052, the petitioner "need not show that the defense would necessarily have been successful if [the alternative strategy or tactic] had been used," rather he only need prove that the alternative "possessed sufficient substance to be a viable alternative." *Fahey*, 769 F.2d at 836. Finally, he must show some link between the actual conflict and the decision to forgo the alternative strategy of defense. In other words, "he must establish that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." *Freund v. Butterworth*, 165 F.3d at 860. The *Freund* Court underlined that "prejudice is presumed only if the defendant demonstrates that ...'an actual conflict of interest adversely affected his lawyer performance.'" *Id.* The Court finds that the *Freund* test applies to the defendant's claim.

2. Waiver

A criminal defendant can waive his right to conflict free counsel. *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975). Before allowing a defendant to relinquish his right to conflict free representation certain procedures must be followed:

> The district court should address each defendant personally and forthrightly advise him of the potential dangers of representation by counsel with a conflict of interest. The defendant must be at liberty to question the district court as to the nature and consequences of his legal representation. Most importantly the court should seek to

> elicit a narrative response from each defendant that he has been advised of his right to effective representation, that he understands the details of his attorney's possible conflict of interest and the potential perils of such a conflict, that he has discussed the matter with his attorney or if he wishes with outside counsel, and that he voluntarily waives the Sixth Amendment protections. It is of course, vital that the waiver be established by "clear, unequivocal, and unambiguous language."

Id. at 278 (citations omitted).

The government argues that the defendant waived his right to conflict free counsel during the plea colloquy before Judge Gagliardi. The government's allegations are not supported by the record. The colloquy between Judge Gagliardi and the defendant failed to establish by "clear, unequivocal, and unambiguous language" the nature and consequences of the defendant's waiver. Even though the Court has no doubt that the defendant understood the nature and consequences of the waiver, the Court reached that conclusion after hearing the testimony at the evidentiary hearing, not from the face of the colloquy. Further, the record shows that the defendant was never informed of his right to an independent counsel.

Whether or not the defendant would have acceded to that representation is irrelevant. The Court finds that the defendant's waiver colloquy did not satisfy the *Garcia* requirements and therefore did not constitute a valid waiver. Accordingly, the Court will address the merits of the defendant's claim.

B. Merits

The defendant's main contention is that the government's conditioning of Sharp's disqualification on whether or not the defendant pled guilty created a conflict of interest. The Court disagrees. The conflict of interest was not created by the government's conditioning Sharp's disqualification on whether or not the defendant pled guilty. The conflict of interest was created by Baxter's allegations of Sharp's unethical and criminal activity. The government's conditioning the disqualification on the guilty plea did not make the conflict any less or any more real.

The defendant contends that by the defendant pleading guilty, Sharp and his firm avoided the publication at trial of Baxter's allegations of improper conduct against Sharp. If, on the other hand, the defendant had proceeded to trial, Baxter would have testified that Sharp and his good friend Hibey concocted a story that Baxter was supposed to tell to the Drug Enforcement Administration negating the defendant's involvement in the marijuana importation.

Sharp's interest did not change by the government's conditioning the disqualification on the plea. However, the defendant has clearly established the existence of an actual conflict of interest based on Baxter's allegations. Baxter, a government witness, alleged that Sharp was involved in criminal conduct related to the crimes charged against the defendant in the indictment.

Pursuant to *Fulton*, if the allegations of the attorney's criminal acts are proved to be true, the defendant need not show that the conflict adversely affected the lawyer's performance. If the allegations are false, the defendant has the burden of proving an adverse effect. *Fulton*, 5 F.3d at 611. Because the Court accepts Sharp's uncontroverted testimony that Baxter's allegations were false, the defendant must show that the conflict had an adverse effect on Sharp's representation of the defendant. The defendant has failed to meet this burden.

As stated above, to prove adverse effect the defendant had to show: 1) a plausible alternative defense strategy that could have been pursued, 2) that the alternative strategy was reasonable under the circumstances, and 3) that the alternative strategy was inherently in conflict with or was not undertaken because of Sharp's other loyalties or interests. *Freund*, 165 F.3d at 860.

The record shows that proceeding to trial was a plausible and reasonable alternative to pleading guilty. However, the record does not support a finding that the defendant's proceeding to trial was inherently in conflict with, or was not undertaken due to, Sharp's loyalties or interests.

Proceeding to trial was not clearly in conflict with Sharp's interests. Sharp testified that part of him wanted to go to trial and clear the record with regard to the allegations. If the defendant had gone to trial, Sharp would have been able to take the stand and contradict Baxter's allegations against him.

The defendant's lawyers, especially Sharp, agonized in deciding whether to go to trial or to enter a guilty plea. Four important factors made Sharp decide to advise the defendant to plead guilty. First, by pleading guilty, the defendant would avoid the possibility of Getchman testifying against him. Second, Sharp could continue representing the defendant because he would not be compelled to testify at trial or cross-examine Baxter. Third, a guilty plea would also avoid the possibility of Sharp testifying against his own client. If Sharp testified, there was a strong possibility that he would have to testify as to the contents of his first conversation with Baxter, which implicated the defendant in the marijuana importation. Fourth, Sharp believed that the defendant could cooperate with the government and earn a reduced sentence based on substantial assistance.

Sharp testified that although he was concerned about the repercussions of Baxter's testimony on his career and reputation as a lawyer, he always placed the defendant's interests before his own. Further, Fitzgibbons's testimony supports Sharp's decision to advise the defendant to plead guilty. Fitzgibbons stated that at the time the defendant entered his guilty plea he believed it was in the defendant's best interest.

The defendant argues that pleading guilty was not a reasonable alternative to going to trial because the defendant was obligated under the plea agreement to forfeit $ 4 million dollars to the government. Nonetheless, Sharp testified that he believed the defendant and his brother Bucky Pegg could raise the money. The defendant did not present any evidence that would show that Sharp's belief was unreasonable.

Accordingly, the Court finds that Sharp's representation of the defendant was not adversely affected by Baxter's allegations. Therefore, the defendant is not entitled to relief on his claim of ineffective assistance of counsel.

III. WITHDRAWAL OF GUILTY PLEA

A. Rules of Law

Pursuant to Rule 32(e), Fed. R. Crim. P., a defendant may withdraw his guilty plea before sentencing if the defendant shows there is a "just and fair reason" for the withdrawal. A defendant does not have an absolute right to withdraw his guilty plea prior to sentencing. *United States v. McCarty*, 99 F.3d 383, 385 (11th Cir. 1996). In determining if the defendant has met his burden the court must consider whether: "(1) close assistance of counsel was available; (2) the plea was knowing and voluntary; (3) judicial resources would be conserved; and (4) the government would be prejudiced if the defendant were allowed to withdraw his plea." *United States v. Buckles*, 843 F.2d 469, 472 (11th Cir. 1988), *cert. denied*, 490 U.S. 1099, 104 L. Ed. 2d 1005, 109 S. Ct. 2450 (1989).

B. Merits

The government correctly asserts that the Court need not address the merits of the defendant's plea withdrawal claim because the claim is procedurally barred. "Generally speaking, an available challenge to a criminal conviction or sentence must be advanced on direct appeal or else it will be considered procedurally barred in a § 2255 proceeding" *Mills v. United States*, 36 F.3d 1052, 1055 (11th Cir. 1994), *cert. denied*, 514

U.S. 1112, 115 S. Ct. 1966, 131 L. Ed. 2d 856 (1995); *see also Cross v. United States*, 893 F.2d 1287, 1289 (11th Cir.), *cert. denied*, 498 U.S. 849, 112 L. Ed. 2d 105, 111 S. Ct. 138 (1990) ("in a section 2255 federal habeas motion, a movant may not raise claims that were not presented on direct appeal unless he can show cause excusing his failure to raise the issues previously and actual prejudice resulting from the errors."); *Greene v. United States*, 880 F.2d 1299, 1305 (11th Cir. 1989), *cert. denied*, 494 U.S. 1018, 108 L. Ed. 2d 498, 110 S. Ct. 1322 (1990) ("in general, a defendant must assert an available challenge to a sentence on direct appeal or be barred from raising the challenge in a section 2255 proceeding."). "When a defendant fails to pursue an available claim on direct appeal, it will not be considered in a motion for § 2255 relief unless he can establish cause for the default and actual prejudice resulting from the alleged error." *Mills*, 36 F.3d at 1055; *see also Greene*, 880 F.2d at 1305 ("[a] defendant can avoid this procedural bar only by showing both cause for the failure to raise the claim on direct appeal and actual prejudice arising from that failure."). Alternatively, under the fundamental miscarriage of justice exception, when a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant relief in the absence of a showing of cause for the procedural default. *Mills*, 36 F.3d at 1055.

The defendant has failed to demonstrate cause or prejudice with regard to his failure to raise on direct appeal his claim that the Court abused its discretion in denying his motion to withdraw his guilty plea. Likewise, the defendant has not shown the applicability of the fundamental miscarriage of justice exception. The Court has reviewed the entire record and concludes that the defendant is unable to satisfy either of the exceptions to the procedural default bar; therefore, the defendant's failure to raise these claims on direct appeal constitutes a waiver and bars him from raising this claim now.

IV. BUCKY PEGG'S PLEA AGREEMENT

Although not relevant to the Court's ruling in this case, the Court notes its outrage with the events leading to Bucky Pegg's plea agreement with the Middle District of Georgia. After the defendant entered his guilty plea on November 29, 1994, the defendant made efforts to satisfy his forfeiture obligation under the plea agreement. To make the $ 4 million forfeiture payment, the defendant had to arrange for money to be transferred into the United States from abroad. Because the defendant was incarcerated, he asked his brother, Bucky Pegg, to accomplish the transfer. At this juncture, Bucky Pegg's attorney, Jerome Froelich became involved. Froelich demanded complete immunity for Bucky Pegg for any criminal liability that could arise from the transfer of the funds. R. Doc. 363, p. 9, & R. Doc. 398, p. 10. After asking the United States Attorney's Office for the Middle District of Florida for an immunity agreement without success, Froelich directed his efforts to trying to obtain a global agreement which included several districts. In his efforts to negotiate a global agreement, Froelich contacted the United States Justice Department. The Justice Department then would communicate with the different districts involved and try to put the multi-district agreement together. R. Doc. 398, p. 12.

On February 1, 1996, after months of negotiations, the U.S. Attorney's Office for the Middle District of Florida, through a letter signed by Collazo, agreed to participate in a multi-district immunity agreement granting Bucky Pegg the immunity he requested. The multi-district agreement included the Middle District of Florida, the Northern District of Georgia, and the Middle District of Georgia. R. Doc. 363, Exhibit E.

On February 7, 1996, Collazo sent a letter to Froelich informing him that the Middle District of Florida could no longer participate in the multi-district immunity agreement. R. Doc. 363, Exhibit F. The reason the Middle District of Florida withdrew its participation in the immunity agreement was that the Southern District of Florida informed them that Bucky Pegg was the subject of an investigation and that the immunity agreement could prevent the Southern District of Florida from investigating and prosecuting Bucky Pegg. R. Doc. 398, pp. 167-8.

Because of Bucky Pegg's failed efforts to reach an immunity agreement involving the Middle District of Florida, Bucky Pegg directed his attention to the Middle District of Georgia, where he ultimately entered into a plea agreement on June 30, 1997. Pursuant to the plea agreement, Bucky Pegg received blanket immunity in exchange for the forfeiture of approximately $ 47 million in cash and $ 5 million in properties. R. Doc. 398, pp. 9-25.

Bob Sharp, the Deputy Chief of the Asset Forfeiture and Money Laundering Section of the Criminal Division, Department of Justice, testified that the Acting United States Attorney in the Middle District of Georgia ignored the directions of the Department of Justice. R. Doc. 405, p. 239. Mary Lee Warren, a Deputy Assistant United States Attorney, instructed the Middle District of Georgia not to go forward with the immunity agreement without her approval or the approval of someone else in the Department of Justice. The Middle District of Georgia blatantly ignored Warren's directives and entered into the plea agreement with Bucky Pegg. R. Doc. 405, p. 240. The Middle District of Georgia's actions, for all practical purposes, resulted in Bucky Pegg being permitted to buy his way out of imprisonment and sell out his brother in the process.

The Justice Department determined that it could not set aside the plea agreement. Accordingly, the funds of Bucky Pegg's forfeiture will go into the Treasury Department's Asset Forfeiture Fund. Even though there is nothing this Court can do to reverse the outrageous and improper events that took place in the Middle District of Georgia, the Court wants to voice its repulsion over the Bucky Pegg plea agreement.

For the foregoing reasons, the defendant's motion to vacate, set aside or correct his sentence (Doc.348) is **DENIED.** The Clerk is instructed to close the civil file.

DONE AND ORDERED in Tampa, Florida, on April 28th, 1999.

Elizabeth A. Kovachevich
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
JAN 3 2002
CLERK

③

No. 01-816

IN THE
Supreme Court of the United States

JOE HARRY PEGG,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Eleventh Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

WILLIAM J. MERTENS*
HENRY W. ASBILL
WILLIAM B. MOFFITT
Asbill, Junkin, Moffitt & Boss, Chtd.
1615 New Hampshire Ave., NW, Suite 200
Washington, DC 20009
(202) 234-9000
Fax: (202) 332-6480

**Counsel of Record*

Dated: January 3, 2002

7400

QUESTION PRESENTED

In the view of amicus, this case presents the following question, which is fairly included within the questions presented in the petition, *see* Supreme Court Rule 14.1(a):

What if any showing of prejudice does the Sixth Amendment require before a defendant may withdraw a guilty plea entered on the advice of an attorney who, a few days before trial, was informed by the prosecutors that if the defendant went to trial—but not if he plead guilty—they would move to disqualify the attorney because of his alleged participation in a criminal plot with his client to influence a key witness's testimony?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT

THIS COURT'S REVIEW IS NECESSARY BECAUSE THE ELEVENTH CIRCUIT'S MISAPPLICATION OF *CUYLER* AND *STRICKLAND* CONFLICTS WITH DECISIONS IN THREE OTHER CIRCUITS AND UNDERMINES DEFENDANTS' SIXTH AMENDMENT RIGHT TO ADVICE FROM UNCONFLICTED COUNSEL BEFORE PLEADING GUILTY. 6

CONCLUSION 18

TABLE OF AUTHORITIES

Cases

Cuyler v. Sullivan, 446 U.S. 335 (1980) .. 2, 5, 8, 11, 14, 17, 18

Frazier v. United States, 18 F.3d 778 (9th Cir. 1994) 18

McMann v. Richardson, 397 U.S. 759 (1970) 9

Stoia v. United States, 22 F.3d 766 (7th Cir. 1994) 18

Strickland v. Washington, 466 U.S. 668 (1984) .. 2, 8, 10, 18

United States v. Cancilla, 725 F.2d 867 (2nd Cir. 1984) 6, 13

United States v. Fulton, 5 F.3d 605 (2nd Cir. 1993) 6, 13

United States v. Mett, 65 F.3d 1531 (9th Cir. 1995) 18

United States v. Miskinis, 966 F.2d 1263 (9th Cir. 1992) 18

Wood v. Georgia, 450 U.S. 261 (1981) 8, 14

Statutes and Rules

28 U.S.C. § 2255 .... 3, 4, 8

Rules Regulating the Florida Bar, Rule 4-8.3(a) 11

Supreme Court Rule 14.1(a) i

Supreme Court Rule 37.3(a) 1

TABLE OF AUTHORITIES—Continued

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible] (1903) ... 8, 14

STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with more than ten thousand members nationwide and twenty-eight thousand affiliate members in fifty states, including private criminal defense lawyers, public defenders, and law professors. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates. The NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. The NACDL is committed to preserving fairness within the American criminal justice system. The NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner. Among the NACDL's objectives are to ensure that appropriate measures are taken to safeguard the rights of all person involved in the criminal justice system and to promote the proper administration of justice.

---

[1] In accordance with Supreme Court Rule 37.6, amicus curiae represents that no party other than counsel for amicus authored this brief in whole or in part, and no person or entity, other than amicus and counsel, have made a monetary contribution to the preparation or submission of this brief. The petitioner and respondent have consented to the filing of this brief, and their letters of consent have been filed with the Clerk of the Court, pursuant to Supreme Court Rule 37.3(a).

SUMMARY OF ARGUMENT

Certiorari should be granted because the Eleventh Circuit has adopted a standard that seriously misapplies this Court's decisions in *Strickland v. Washington*, 466 U.S. 668, 692 (1984), and *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980), regarding the showing that a defendant must make when seeking to withdraw a guilty plea on the ground that defense counsel's personal interests conflicted with the legal interests of his client when the lawyer advised the client to plead guilty. *Strickland* and *Cuyler* require only a showing that an actual conflict of interest adversely affected some aspect of the attorney's performance. The Eleventh Circuit, though it used language from *Cuyler*, in reality has adopted what amounts to an outcome-determinative standard that this Court has rejected for Sixth Amendment claims based on defense counsel's conflict of interest. The Eleventh Circuit's standard, as applied, required a defendant to demonstrate that, but for counsel's conflict, the defendant would not have plead guilty.

In the present case, the government conceded and the lower courts found that petitioner's lead trial attorney, James E. Sharp, was laboring under a conflict of interest when he advised petitioner to plead guilty. Just a few days before trial, the prosecutor notified Sharp that unless his client entered a guilty plea, the office of the United States Attorney would seek Sharp's disqualification and that of his law partners. A prosecutor provided Sharp a draft motion, which accused the lawyer of conspiring with petitioner to suborn perjury and obstruct justice by having a government witness testify falsely in petitioner's favor.

Sharp had been preparing for trial, but his efforts abruptly changed. The day of trial, he sought a continuance to work out arrangements for a guilty plea, and the court granted the defense 24 hours. Sharp then advised petitioner to change his plea, and the next day, on counsel's advice, petitioner plead guilty. Sharp later denied placing his own interests ahead of his client's when he gave this advice, but he admitted considering his own interests as well.

Petitioner subsequently sought to withdraw his guilty plea. The court of appeals affirmed the district court's denial of relief under 28 U.S.C. § 2255 on the ground that petitioner failed to demonstrate prejudice from the conflict under Eleventh Circuit precedent that required, among other things, a showing that "the attorney's actual conflict adversely affected the defendant's decision to plead guilty." (App. B-11) The

Eleventh Circuit constructed an alternative explanation for defense counsel's advice and petitioner's decision to plead guilty. According to the Eleventh Circuit, the guilty plea could be attributed to a deal by an alleged co-conspirator, Bernie Getchman, to become a government witness against petitioner.

The petition shows that the court of appeals has seriously misread the record. Getchman made no deal, and in this and other important ways, the decision of the court of appeals rests on clearly erroneous findings.

More fundamentally, the decision of the court of appeals misapplied *Cuyler* and *Strickland*, and conflicted with decisions of the Second, Seventh, and Ninth Circuits. It was not petitioner's burden to show that, but for his attorney's conflict, he would not have plead guilty. At most, he needed to show that Sharp's conflict adversely affected the attorney's performance, as it plainly did. The conflict had a direct impact on Sharp's representation of petitioner as he immediately changed gears from preparing for trial to advising petitioner to plead guilty. The timing of this change could not have been coincidental. Because of the conflict, Sharp was unable to give unconflicted advice whether petitioner should stand trial or plead guilty. Instead, Sharp gave advice that was irredeemably tainted by Sharp's own desire to protect his reputation if not also his livelihood and freedom. Testifying at the § 2255 hearing, Sharp admitted that self-preservation was a consideration when he advised petitioner to plead guilty.

The petition makes a strong argument for a *per se* rule similar to one that the Second Circuit has adopted, requiring no further showing of prejudice when defense counsel is accused of participating with his client in crimes related to those that are before the court. In the view of the NACDL, however, it is sufficient for this case to state a rule that will apply more generally to cases where defense counsel had an actual conflict of interest when advising their clients to plead guilty. The NACDL recommends that the Court hold that a defendant should be allowed to withdraw a guilty plea when (1) the lead defense attorney developed a real and substantial conflict of interest in the form of a personal interest in avoiding trial, (2) the attorney nonetheless advised the client to plead guilty, (3) the attorney considered his own conflicted interest when he gave that advice, and (4) the client then accepted the lawyer's advice by pleading guilty. This standard is faithful to *Cuyler* and consistent with the understanding of *Cuyler* in other Circuits. Unlike the Eleventh Circuit's test, it will protect a defendant's right to conflict-free advice of counsel before taking the momentous step of waiving trial and entering a guilty plea.

ARGUMENT

THIS COURT'S REVIEW IS NECESSARY BECAUSE THE ELEVENTH CIRCUIT'S MISAPPLICATION OF *CUYLER* AND *STRICKLAND* CONFLICTS WITH DECISIONS IN THREE OTHER CIRCUITS AND UNDERMINES DEFENDANTS' SIXTH AMENDMENT RIGHT TO ADVICE FROM UNCONFLICTED COUNSEL BEFORE PLEADING GUILTY.

The NACDL joins petitioner in requesting that certiorari be granted. The case presents important questions concerning the requirements of the Sixth Amendment when the personal interests of defense counsel conflict with those of the client on whether the client should stand trial or plead guilty. The courts of appeals have taken inconsistent approaches regarding similar conflicts of interest between defense attorneys and their clients. The approach of the Eleventh Circuit in this case conflicts with that of the Second Circuit in *United States v. Fulton*, 5 F.3d 605 (2nd Cir. 1993), and *United States v. Cancilla*, 725 F.2d 867 (2nd Cir. 1984). Whatever the correct standard may be, the Eleventh Circuit's standard must be wrong if it lets petitioner's guilty plea stand despite his lead counsel's acknowledgment that he considered his own self-interest in avoiding a formal accusation at trial of criminal and unethical conduct by the office of the U. S. Attorney, when this lawyer advised petitioner to plead guilty.

The conflict here between counsel's own interest in self-preservation and his client's right to disinterested advice hardly could have been more acute. Ten days before trial, prosecutors informed petitioner's lead trial attorney that the United States would seek to disqualify him and his partners from representing petitioner at trial. The prosecutors gave Sharp a copy of a draft disqualification motion accusing him of acting unethically and criminally by plotting with petitioner to encourage a key witness in this case, Reggie Baxter, to perjure himself before the grand jury and at trial to help petitioner escape conviction. The prosecutors told Sharp, however, that if petitioner waived trial by pleading guilty, then they would not seek disqualification (and the accusation against Sharp thus might never be made public).

Until then, petitioner had steadfastly demanded trial. Days earlier, he told the prosecutors that he rejected any plea bargain. But when Sharp appeared in court on the day of trial, November 28, 1994, he asked for a 10-day continuance so that a guilty plea could be worked out. Without contradiction, defense witnesses at the § 2255 hearing later testified that petitioner was surprised by this turn. The court granted Sharp just 24 hours. Sharp then counseled petitioner to accept a hastily negotiated plea bargain, and the next morning, petitioner entered a guilty plea upon Sharp's advice.

The Court's decisions establish a distinct test for whether a conflicted criminal defense attorney's representation satisfied the Sixth Amendment right to representation by counsel. In order to show a Sixth Amendment violation, "a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Strickland v. Washington*, 466 U.S. 668, 692 (1984) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980)). In *Wood v. Georgia*, 450 U.S. 261 (1981), the Court applied this rule in a case where the defendants' employer, an adult book store, paid their attorney's fees in a prosecution arising out of their employment. The Court stated that because of this arrangement, the lawyer "may not have pursued their interests single-mindedly," *id.* at 271-72, and it remanded the case for findings on "whether counsel was influenced in his basic strategic decisions by the interests of the employer who hired him." *Id.* at 272.

At the hearing in the district court on petitioner's request under 28 U.S.C. § 2255 to vacate his conviction by withdrawing his guilty plea, Sharp insisted that notwithstanding the prosecutors' threat to lodge a formal accusation against him personally of unethical and criminal conduct if petitioner exercised his right to stand trial, Sharp put his client's interests first in urging petitioner to plead guilty. Sharp nonetheless conceded that he considered this personal threat when he advised his client to plead guilty, and it could hardly have been otherwise.

No one would deny the vital importance of counsel's advice when a defendant pleads guilty. A guilty plea is a comprehensive waiver of trial rights, and the decision to plead guilty is the most important and often the hardest decision a criminal defendant makes about the case. In *McMann v. Richardson*, 397 U.S. 759 (1970), the Court explained that "the decision to plead guilty before the evidence is in frequently involves the making of difficult judgments." *Id.* at 769. Much rests on counsel's opinion of untested and often uncertain evidence and witnesses, subjective and uncertain though that opinion may be:

> Counsel must predict how the facts, as he understands them, would be viewed by a court. If proved, would those facts convince a judge or jury of the defendant's guilt? . . . Questions like these cannot be answered with certitude; yet a decision to plead guilty must necessarily rest upon counsel's answers, uncertain as they may be.

Id. at 769-70.

Especially in view of the nature of counsel's task, a defendant is entitled to his attorney's single-minded loyalty when the attorney advises the client to plead guilty. *Cf. Strickland v. Washington*, 466 U.S. at 692 (duty of loyalty is "perhaps the most basic of counsel's duties"). Moreover, unlike many strategic and tactical decisions a lawyer must make in the course of trial, the decision to plead guilty or stand trial is uniquely and emphatically the defendant's. When, as here, the attorney has strong personal reasons to forego trial, there is a grave risk that those interests will color the attorney's judgment about whether the defendant should plead guilty or stand trial, and also color how the lawyer explains that advice. Conceivably, an attorney may believe sincerely that he can put his personal concerns aside and render disinterested advice despite the attorney's own strong interest not to go to trial. Or, after the fact, the attorney may rationalize that he did put his own concerns aside. But human nature being what it is, even among lawyers, the risk is too great that the attorney's judgment will be colored even if the specific taint is hard to pin down.

For reasons such as this, the petitioner has urged the Court to adopt a *per se* rule to allow a defendant to withdraw a guilty plea, if, when his lawyer advised him to plead guilty, the attorney was laboring under an actual conflict between the attorney's own interests and those of the client. Petitioner would not require any further showing that the "conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. at 348.

The argument in favor of such a *per se* rule is strong. Prejudice is quite probable in this situation, but lawyers may be unlikely to admit that they let their personal interests taint their advice, and the courts are poorly equipped to discern an attorney's actual frame of mind and motivations in making a subjective judgment on the merits of going to trial versus pleading guilty. Moreover, the conflict of interest is utterly avoidable in a case such as this. The prosecutors were responsible for setting up Sharp's conflict, at least in the form that it took. They threatened to accuse Sharp, in a public filing, of criminal and unethical conduct, with potentially devastating consequences for his reputation and career if not also his liberty, if petitioner went to trial. But they made clear that they would turn a blind eye to Sharp's alleged wrongdoing if petitioner plead guilty. Whatever the prosecutors' motivations may have been,[2] their threat created a powerful incentive for Sharp to have petitioner change his plea. They then exacerbated the problem—or at least failed to mitigate it—by failing to inform the court of their concerns about Sharp and the threat to move for disqualification if petitioner went to trial.

---

[2] Rule 4-8.3(a) of Rules Regulating the Florida Bar provides that "A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate professional authority." The (continued...)

Further, even after the prosecutors created the conflict by their contingent threat, Sharp may have avoided giving petitioner conflicted legal advice if he and his firm had withdrawn from advising petitioner at all on whether he should plead guilty, leaving that to

---

[2](...continued)
prosecutors never gave a coherent explanation why, if they believed there was credible evidence of the serious misconduct that they described in the draft disqualification motion, they ignored it once petitioner entered his guilty plea.

Assuming the *bone fides* of the prosecutors' allegations against Sharp, even if in the end those allegations were in error, the prosecutors performed a disservice to the trial court and justice, as well as to petitioner's constitutional rights, when they made the disqualification motion contingent on petitioner's decision to stand trial. The prosecutors gave Sharp a route of escape and in doing so placed enormous pressure on him to have petitioner plead guilty. Many lawyers could find such pressure irresistible. And by holding back the disqualification motion until petitioner decided whether to plead guilty, the prosecutors made it harder or impossible for the trial court to investigate and resolve the issue in a more timely and less prejudicial way.

unconflicted local counsel (assuming, at least, that local counsel had comparable knowledge of the case and was not beholden to Sharp, who had retained him).

This *per se* approach essentially follows the Second Circuit's approach in *United States v. Fulton*, 5 F.3d at 610, and *United States v. Cancilla*, 725 F.2d at 870, when a government witness claims at trial that defense counsel participated in crimes related to the charges against the defendant at that trial. Unless the witness's allegations have been shown in a timely way to be patently and demonstrably false, the Second Circuit treats the resulting conflict of interest as *per se* prejudicial. This kind of conflict pits the attorney's own instinct for self-preservation against the client's interest in undivided loyalty and threatens to color the attorney's conduct of the entire trial. Even if the defendant later is unable to show specifically how the attorney's performance was adversely affected, the Second Circuit presumes prejudice.

In the view of the NACDL, it is, however, unnecessary in the present case to use a *per se* rule. Petitioner should be allowed to withdraw his guilty plea because (1) his lead trial attorney developed a real and substantial conflict of interest when the attorney developed a personal interest in avoiding trial, (2) the attorney nonetheless advised his client to plead guilty, (3) the attorney considered his own personal interest when he gave that advice, and (4) the client then accepted the lawyer's advice by pleading guilty. In other words, the fact that the attorney had his personal interests in mind, and considered them, when advising the defendant to plead guilty makes a *per se* rule unnecessary. This circumstance is sufficient to show, under *Cuyler*, that the conflict adversely affected the lawyer's performance, by making the advice less than disinterested. On the other hand, if because of remoteness of the conflict or for some other reason, there is no direct or circumstantial evidence that the attorney actually considered his own interest when advising the defendant to plead guilty, then the plea may stand because an adverse effect has not been shown. In that circumstance, the lawyer did in fact pursue the client's interests "single-mindedly," *Wood v. Georgia*, 450 U.S. at 272, and the defendant received the dispassionate advice that the Sixth Amendment guarantees. To be sure, in a case where defense counsel faces formal accusation of criminal wrongdoing if the case goes to trial, the outcome nearly always would be the same whether this test or a *per se* rule applies. A lawyer rarely if ever could put such a risk out of mind or fail to consider it. Nonetheless, the proposed test requires a showing and does not just presume *Cuyler*'s requirement that the conflict adversely affected the attorney's performance.

In the view of the NACDL, the petition for certiorari shows convincingly why the Eleventh Circuit's approach is unsound. The Eleventh Circuit required petitioner to make a showing that is difficult to distinguish from a but-for causal connection between Sharp's conflict and petitioner's decision to plead guilty. Relying on prior Eleventh Circuit precedent, the court said that petitioner needed to show

> (1) the existence of a plausible alternative defense strategy or tactic that might have been pursued; (2) that the alternative strategy or tactic was reasonable under the facts; and (3) a link between the actual conflict and the decision to forgo the alternative strategy of defense. . . . If there is a guilty plea involved, this Court looks at whether the attorney's actual conflict adversely affected the defendant's decision to plead guilty.

(App. B-10 to B-11)

The court then concluded that even if Sharp was free of his conflict of interest, his advice would have been the same, and petitioner would have entered a guilty plea anyway, or at least that petitioner failed to show otherwise. (App. B-11 to B-12)

The petition shows that courts are ill equipped to make such an inquiry regarding the connection between an attorney's conflict and the defendant's decision to plead guilty, as the Eleventh Circuit's decision itself illustrates. The court's decision to deny petitioner relief rests on three clearly erroneous assertions about the case: (1) The Eleventh Circuit believed that the plea arrangement was the creation of petitioner's local counsel, John Fitzgibbons, not Sharp, but Fitzgibbons himself testified that Sharp devised the deal. (2) The Eleventh Circuit believed that all of petitioner's attorneys agreed that petitioner should plead guilty, but in fact, Paul Knight, one of Sharp's partners, believed that the plea was improvident because petitioner could not meet its terms (especially a promise to forfeit assets of a specific value), and Knight so advised Sharp.[3] (3) The Eleventh Circuit believed that before petitioner entered his plea, an alleged co-conspirator, Bernie Getchman, had agreed to testify for the government, but he had not. This third point is especially critical. The Eleventh Circuit's opinion acknowledged that until Sharp received the draft disqualification motion, petitioner's attorneys "were preparing to go to trial and did not intend to enter a guilty plea." (B-6) The court of appeals seems to have concluded that the "link" it required between Sharp's conflict and petitioner's guilty plea cannot be shown, because petitioner must have plead guilty in response to Getchman's defection rather than Sharp's predicament. The petition shows that the court of appeals erred in believing that there even was a defection.

---

[3] Knight's concern was well placed. Petitioner was unable to forfeit the $4 million in assets that the government wanted, and at sentencing petitioner was found in violation of the plea agreement for this reason.

In any event, *Cuyler* rejects an outcome-based prejudice standard such as the Eleventh Circuit employed, when defense counsel labors under an actual conflict of interest, as Sharp did. *Cuyler* requires only that the defendant "demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. at 348.[4] Sharp was unable to render disinterested advice on whether petitioner should plead guilty, and when he advised petitioner to plead guilty, Sharp admittedly considered his own compelling, personal interest that petitioner do so. This all that *Cuyler* requires for a valid Sixth Amendment claim.

---

[4] The Eleventh Circuit required a showing that Sharp's conflict "adversely affected *the defendant's decision to plead guilty*" (App. B-10 to B-11; emphasis supplied), while *Cuyler* required only a showing that a conflict "adversely affected *[the] lawyer's performance*." 446 U.S. at 348 (emphasis supplied). The Eleventh Circuit's substitution of the defendant's decision for the lawyer's performance clearly conflicts with *Cuyler* and constitutes an outcome determinative test that the Court expressly rejected in both *Cuyler* and *Strickland* for a Sixth Amendment claim based on counsel's conflict of interest.

The petition explains that the Eleventh Circuit's view of the *Cuyler* standard conflicts with the view of the Seventh Circuit in *Stoia v. United States*, 22 F.3d 766, 771 (7th Cir. 1994) ("a [reasonable] likelihood that counsel's performance would have been different"), and the Ninth Circuit in *Frazier v. United States*, 18 F.3d 778, 787 (9th Cir. 1994) (quoted in *Stoia*), *United States v. Mett*, 65 F.3d 1531, 1535 (9th Cir. 1995) ("need only show that some effect on counsel's handling of particular aspects of the trial was likely"), and *United States v. Miskinis*, 966 F.2d 1263, 1268 (9th Cir. 1992) (quoted in *Mett*).

CONCLUSION

Certiorari should be granted to review the decision of the Eleventh Circuit. That decision conflicts with decisions in the Second, Seventh, and Ninth Circuits and misapplies this Court's decisions in *Cuyler v. Sullivan* and *Strickland v. Washington*. This Court's guidance is needed on the question of the showing that is required when a defendant claims that defense counsel's conflict of interest rendered the attorney's advice to plead guilty constitutionally deficient

Dated: January 3, 2002

Respectfully submitted,

WILLIAM J. MERTENS*
HENRY W. ASBILL
WILLIAM B. MOFFITT
Asbill, Junkin, Moffitt & Boss, Chtd.
1615 New Hampshire Ave., NW, Suite 200
Washington, DC 20009
(202) 234-9000
Fax: (202) 332-6480

Counsel for Amicus Curiae the National Association of Criminal Defense Lawyers

**Counsel of Record*

Supreme Court U.S.
FILED
MAR 4 2002
OFFICE OF THE CLERK

4

No. 01-816

In the Supreme Court of the United States

JOE HARRY PEGG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

THEODORE B. OLSON
Solicitor General
Counsel of Record

MICHAEL CHERTOFF
Assistant Attorney General

THOMAS M. GANNON
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

1488

QUESTIONS PRESENTED

1. Whether a defendant seeking reversal of his conviction based on a conflict of interest stemming from counsel's alleged involvement in conduct related to the defendant's crime must show that the conflict adversely affected counsel's performance.

2. Whether a defendant seeking reversal of his conviction based on a conflict of interest must establish a link between the conflict and counsel's failure to pursue an alternative defense strategy.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Discussion	6
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Burger v. *Kemp*, 483 U.S. 776 (1987)	9
Cuyler v. *Sullivan*, 446 U.S. 335 (1980)	6, 8, 10
Mickens v. *Taylor*, cert. granted, 532 U.S. 970 (2001)	10, 11
Smith v. *Robins*, 528 U.S. 259 (2000)	6
Stoia v. *United States*, 22 F.3d 766 (7th Cir. 1994)	9, 10
Strickland v. *Washington*, 466 U.S. 668 (1984)	6, 7
United States v. *Fulton*, 5 F.3d 605 (2d Cir. 1993)	5, 8
United States v. *Mett*, 65 F.3d 1531 (9th Cir. 1995), cert. denied, 519 U.S. 870 (1996)	9, 10
Wood v. *Georgia*, 450 U.S. 261 (1981)	9

Statutes:

21 U.S.C. 963	2
28 U.S.C. 2255	2, 4

In the Supreme Court of the United States

No. 01-816

JOE HARRY PEGG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B3-B15) is reported at 253 F.3d 1274. The order of the district court (Pet. App. C16-C48) is reported at 49 F. Supp. 2d 1322.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 2001. A petition for rehearing was denied on August 3, 2001. (Pet. App. A1-A2.) The petition for a writ of certiorari was filed on November 1, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a plea of guilty in the United States District Court for the Middle District of Florida, petitioner was convicted of conspiring to import marijuana, in violation of 21 U.S.C. 963. Petitioner was sentenced to 360 months' imprisonment, to be followed by five years of supervised release. Petitioner did not appeal his conviction or his sentence. Petitioner filed a motion for post-conviction relief under 28 U.S.C. 2255. The district court denied the motion, and the court of appeals affirmed. (Pet. App. B3-B15).

1. In 1981, petitioner hired attorney James Sharp to represent him on drug importation charges in Louisiana and Florida. Pet. App. B4. Sharp and petitioner became friends, and Sharp continued to represent petitioner thereafter. *Ibid.*

In March 1994, a federal grand jury charged petitioner and others with conspiring to import marijuana. Pet. App. B4. Sharp and his law partner, Tom Lankford, agreed to represent petitioner on those charges. *Id.* at B5. Petitioner retained Tampa, Florida, attorney, John Fitzgibbons, as local counsel. *Ibid.* Assistant United States Attorney (AUSA) Cynthia Collazo met frequently with petitioner's three attorneys to discuss a possible plea agreement. *Ibid.* They also discussed the likelihood that petitioner would receive a reduced sentence if he pleaded guilty and cooperated with the government. *Ibid.*

In September 1994, counsel for alleged co-conspirator Reggie Baxter informed AUSA Collazo that Sharp might have had privileged conversations with Baxter that would create a conflict of interest for Sharp in his representation of petitioner. Pet. App. B5. Collazo sent Drug Enforcement Administration (DEA) Agent

Sam Murad to interview Baxter. *Ibid.* Collazo also wrote to Sharp and Lankford to alert them to the possibility that Sharp's contact with Baxter had given rise to a conflict of interest. *Ibid.* Sharp and Lankford responded that no conflict existed. *Ibid.* Collazo then interviewed Baxter, who told her that Sharp had met with him and arranged for petitioner to pay part of his legal fees. *Id.* at B5-B6. Baxter also stated that petitioner had retained attorney Dick Hibey to represent Baxter and that Sharp and Hibey had helped him to concoct a false story in order to exculpate petitioner. *Id.* at B6.

AUSA Collazo notified petitioner's attorneys that they should alert the district court to the possibility of a conflict of interest. Pet. App. B6. Fitzgibbons told Collazo that he was prepared to try the case in the event that Sharp and Lankford were disqualified. *Ibid.* The government prepared a motion to disqualify Sharp and Lankford and faxed it to them. *Ibid.* Petitioner's attorneys decided that if Sharp testified at trial, Fitzgibbons would assume the role of lead attorney. *Ibid.* Petitioner's attorneys discussed the nature of Sharp's conflict with petitioner, and petitioner begged Sharp not to withdraw from the case. *Ibid.*

The parties appeared in court prepared to argue the disqualification motion and other pretrial motions. Pet. App. B7. Before the hearing began, however, co-defendant Bernie Getchman unexpectedly pleaded guilty. *Ibid.* During his plea colloquy, Getchman testified that petitioner had hired him to direct, organize, and control the marijuana importation operation and that he had done so at petitioner's direction. *Ibid.* The district court granted the parties a continuance until the following day to attempt to negotiate a plea. *Ibid.*

Collazo, Sharp, and Lankford agreed that a DEA agent would interview petitioner to determine whether petitioner had information that would warrant the filing of a motion for a reduced sentence. Pet. App. B7. The DEA agent told petitioner that if he cooperated with the government, the government would likely file a motion to reduce his sentence. *Ibid.* Fitzgibbons, who was familiar with the judges in the Middle District of Florida, informed petitioner's other attorneys that petitioner would likely receive a lenient sentence if he pleaded guilty, transferred his assets to the government, and cooperated in interviews with DEA. *Ibid.*

Petitioner's attorneys negotiated a written plea agreement with the government, which they brought to petitioner. Pet. App. B8. All petitioner's attorneys agreed that it would be in petitioner's best interest to plead guilty, and petitioner agreed. *Ibid.* At a plea hearing, petitioner stated that he was aware of his attorney's conflict of interest, and that he waived the conflict. *Id.* at C30. Following his plea, the government afforded petitioner several opportunities to offer assistance to the government, but petitioner was not truthful during the interviews. Pet. App. B8 The government therefore refused to move for a downward departure. *Ibid.* When petitioner learned that the government was not going to file a downward departure motion, he moved to withdraw his plea. *Ibid.* The district court denied that request. *Ibid.* Petitioner was sentenced to 360 months' imprisonment. *Id.* at B4.

2. Petitioner moved for post-conviction relief pursuant to 28 U.S.C. 2255. Pet. App. B4. Following an evidentiary hearing, the district court denied petitioner's motion. *Id.* at C16-C48.

The district court first determined that petitioner had not validly waived his right to conflict-free representation at his plea hearing, because the district court had not explained to him the nature and the consequences of the waiver. Pet. App. C38-39. The district court next ruled that petitioner had established that Sharp had an actual conflict of interest. The court reasoned that while Baxter had falsely accused Sharp of criminal conduct, Baxter's allegations were sufficient to create a conflict. *Id.* at C40.

The district court went on to hold, however, that petitioner had failed to show that Sharp's conflict adversely affected his performance. Pet. App. C41-C42. The court found that Sharp advised petitioner to plead guilty because he believed a plea was in petitioner's interest, not because he feared public disclosure of Baxter's allegations. *Ibid.* In support of that finding, the court noted that Sharp was legitimately concerned that Getchman would testify against petitioner, that Sharp had reason to believe that petitioner would receive a more lenient sentence if he cooperated with the government, and that Fitzbiggons also advised petitioner to plead guilty. *Ibid.*

3. The court of appeals affirmed. Pet. App. B3-B15. It held that petitioner had failed to show that Sharp's conflict of interest adversely affected his performance. *Id.* at B10-B12. The court reasoned that all of petitioner's attorneys, including Fitzgibbons, had advised him to plead guilty, that Getchman's testimony "would have been devastating to [petitioner's] case," and that petitioner's assertion that Sharp advised petitioner to plead guilty to avoid public exposure of Baxter's allegations was "at best speculative." *Id.* at B12.

The court rejected petitioner's contention, based on *United States* v. *Fulton*, 5 F.3d 605 (2d Cir. 1993), that prejudice should be presumed because defense counsel was allegedly implicated in conduct related to the defendant's crime. Pet. App. B13-B15. The court explained that *Fulton* recognized that prejudice should not be presumed when, as here, the district court finds the allegations of criminal conduct are false. *Id.* at B14. The court also noted that Baxter's allegations involved counsel's representation of the defendant in preparation for trial; they "did not involve a charge that counsel was involved in the crime with which defendant was charged." *Id.* at B14-B15. The court also rejected petitioner's reliance on *Fulton* because Fitzgibbons, who was conflict-free, also advised petitioner to plead guilty. *Id.* at B15.

DISCUSSION

1. Petitioner contends (Pet. 12-18) that when an attorney has a conflict of interest stemming from his alleged involvement in unlawful conduct related to the defendant's crime, prejudice should be presumed without a showing that the conflict adversely affected counsel's performance. That contention is without merit and does not warrant review.

In *Cuyler* v. *Sullivan*, 446 U.S. 335, 348 (1980), the Court held that "[i]n order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." In *Strickland* v. *Washington*, 466 U.S. 668 (1984), the Court reaffirmed that the rule for conflicts of interest is not one of "per se" prejudice. *Id.* at 692. Instead, "[p]rejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Ibid.* (quoting *Cuyler*, 446 U.S. at 350). Similarly, in *Smith* v. *Robins*, 528 U.S. 259, 287 (2000) (citation omitted), the

Court noted that "prejudice is presumed when counsel is burdened by an actual conflict of interest, although in such a case we do require the defendant to show that the conflict adversely affected his counsel's performance." Thus, under this Court's decisions, proof of a conflict is not sufficient by itself to presume prejudice or establish a Sixth Amendment violation. A defendant must also show that the conflict adversely affected counsel's performance.

Petitioner contends (Pet. 14) that prejudice should be conclusively presumed in cases in which a conflict stems from defense counsel's alleged involvement in unlawful conduct related to the defendant's crime because there is a greater danger in such cases that counsel's performance will be adversely affected. As *Cuyler*, *Strickland*, and *Smith* make clear, however, the requirement of showing an adverse effect on performance applies to all conflict of interest claims. The Court's uniform approach to conflict cases is sound. It is very unlikely that conflicts can be classified based on their likelihood of causing an adverse effect on performance. Cf. *Strickland*, 466 U.S. at 693 (noting that attorney errors "cannot be classified according to [their] likelihood of causing prejudice"). Indeed, petitioner offers no evidence that conflicts stemming from defense counsel's alleged involvement in unlawful conduct related to the defendant's crime are more likely than other conflicts to affect performance adversely. Even if such conflicts were more likely than others to lead to an adverse effect on performance, however, that would simply mean that the defendant should have an easier time making the required showing in such cases. It would not justify relieving a defendant of the burden of establishing that such an effect actually occurred in his case. Thus, as in other conflict cases, a defendant seeking to overturn a conviction based on a conflict of interest stemming from an attorney's alleged involvement in unlawful conduct related to the defendant's crime must show that the conflict adversely affected counsel's performance.

In support of his contrary view, petitioner relies on the Second Circuit's holding in *United States* v. *Fulton*, 5 F.3d 605 (1993), that prejudice may be presumed when an attorney's conflict stems from his involvement in unlawful conduct related to the defendant's crime. But *Fulton* suggested that prejudice should not be presumed when a district court has held a hearing and found that the allegations of defense counsel's unlawful conduct are false. 5 F.3d at 613. Here, the district court conducted a hearing and determined that Baxter's allegations against Sharp were false. Pet. App. B14. Moreover, in this case, Baxter alleged that defense counsel was involved in an effort to alter testimony that might be damaging to the defendant. He did not allege that defense counsel was involved in the defendant's underlying crime. Finally, as the court of appeals noted, Fitzgibbons, who was conflict-free, also advised petitioner to plead guilty. *Id.* at B-14-B15. For those reasons, petitioner's reliance on *Fulton* is misplaced.

2. Petitioner contends (Pet. 21) that the court of appeals' holding that a defendant must establish "a link between the actual conflict and the decision to forgo the alternative strategy of defense" (Pet. App. B10) conflicts with *Cuyler*. That contention is also without merit and does not warrant review.

As noted above, *Cuyler* holds that a defendant must establish that "an actual conflict of interest adversely affected * * * his lawyer's performance." 446 U.S. at 348. That formulation—particularly the use and placement of the term "affected"—makes clear that a defendant must establish a causal link between the conflict and counsel's alleged adverse performance. That understanding squares with the Court's focus in *Wood* v. *Georgia*, 450 U.S. 261 (1981), on "whether counsel was influenced in his basic strategic decisions *by the [alleged conflicting] interests.*" *Id.* at 272 (emphasis added); see *Burger* v. *Kemp*, 483 U.S. 776, 787 (1987) (considering whether "an adverse effect resulted from [the attorney's] actual conflict of interest").

Petitioner argues (Pet. 22-23) that, under the court of appeals' causation requirement, a defendant cannot prevail unless he can show that there is no plausible reason, other than the conflict, for defense counsel's failure to pursue an alternative defense strategy. The court of appeals did not adopt any such standard. Instead, it ruled against petitioner because the record firmly established that a guilty plea was in petitioner's interest and that Sharp had acted to further petitioner's interests, rather than his own. Pet. App. B11-B12. As the court of appeals explained, if petitioner had not pleaded guilty, Getchman would have testified against petitioner and "his testimony would have been devastating to [petitioner's] case." *Id.* at B12. Moreover, as the court of appeals noted, conflict-free counsel Fitzgibbons offered petitioner precisely the same advice to plead guilty as Sharp.

Petitioner contends (Pet. 24) that the court of appeals' causation requirement conflicts with the decisions in *Stoia* v. *United States*, 22 F.3d 766 (7th Cir. 1994), and *United States* v. *Mett*, 65 F.3d 1531 (9th Cir. 1995), cert. denied, 519 U.S. 870 (1996). Like the Eleventh Circuit, however, the Seventh and Ninth Circuits also require a defendant to establish a causal link between the conflict and an adverse effect on performance. In *Stoia*, the Seventh Circuit held that a defendant "in addition to showing that [his attorney] had an actual conflict of interest, must also demonstrate how that conflict adversely affected [the attorney's] performance." 22 F.3d at 772. The court further stated that a defendant could satisfy the causation requirement by showing that there was a "reasonable probability" that counsel's actions were "dictated" by a conflict. *Id.* at 773. In *Mett*, the Ninth Circuit stated that its cases "have not set up any formal test for determining whether counsel's performance was adversely affected," but that *Cuyler's* adverse effect prong remains "a substantial hurdle." 65 F.3d at 1535. The court found no evidence in that case that the attorney's alleged conflict "likely" caused an adverse effect on his performance. *Ibid.* Those decisions do not use precisely the same verbal formulation for the causation requirement as the Eleventh Circuit. But there is no reason to believe that the standards are substantively different or that they lead to any difference in results. That is particularly true in a case like this one, where the record establishes that defense counsel performed as he did because he believed it to be in the defendant's interest, and not because of any conflicting interest.

3. In *Mickens* v. *Taylor*, 532 U.S. 970 (2001) (No. 00-9285), this Court granted review limited to the following question: "Did the Court of Appeals err in holding that a defendant must show an actual conflict of interest and an adverse effect in order to establish a Sixth Amendment violation where a trial court fails to inquire into a potential conflict of interest about which it reasonably should have known?" Petitioner did not present that question in this case. Nor did he argue below that the district court failed to inquire into a potential conflict of interest about which it reasonably

should have known, or that such a failure relieved him of the burden to establish that his attorney's conflict adversely affected his performance.

Nonetheless, it is possible that the question at issue in *Mickens* is fairly included within the questions that petitioner has presented. In addition, the district court was aware of a potential conflict at the time it accepted petitioner's guilty plea. Pet. App. C30. Finally, the district court, on collateral review, found that there was not a sufficient inquiry into that conflict to secure a valid waiver of petitioner's right to conflict-free representation, *id.* at C38-C39, and the court of appeals did not disturb that finding. In those circumstances, the Court may wish to hold the present petition pending the decision in *Mickens*, and then dispose of it as appropriate in light of that decision. Alternatively, since petitioner did not present a *Mickens*-type claim in the courts below, further review may not be warranted.

CONCLUSION

The petition for a writ of certiorari should be held pending the decision in *Mickens* v. *Taylor*, cert. granted, 532 U.S. 970 (2001) (No. 00-9285), and disposed of as appropriate in light of that decision. Alternatively, the petition should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

MICHAEL CHERTOFF
Assistant Attorney General

THOMAS M. GANNON
Attorney

MARCH 2002